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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

No. [redacted] 200

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL., *Petitioners*,

v.

NATIONAL MEDIATION BOARD, ET AL., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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No.

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v.

NATIONAL MEDIATION BOARD, ET AL., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on March 14, 1969.

Citation to Opinions Below

The opinion of the Court of Appeals, which is not yet officially reported, is printed in the appendix to this Petition at pages 1-19. The findings of fact, conclusions of law, and judgment of the District Court, which are reported at 284 F. Supp. 344, are printed in the appendix hereto at pages 21-37. The letter-opinion and order of the National Mediation Board, which is not officially reported, is printed in the appendix hereto at pages 38-41.

Jurisdiction

The judgment of the Court of Appeals was entered on March 14, 1969 (App. *infra* p. 20), and a timely petition for rehearing was denied on April 29, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

Two unions, the Brotherhood of Locomotive Engineers (the "Engineers") and the Brotherhood of Locomotive Firemen and Enginemen (the "Firemen"), asserted conflicting rights to bargain with the railroad petitioners respecting the rates of pay, rules, and working conditions of apprentice locomotive engineers. The Firemen asserted that the railroads were required to negotiate with the Firemen and that, should negotiations not produce an agreement acceptable to the Firemen, they would be entitled to strike the railroads after exhaustion of the required procedures of the Railway Labor Act. The Engineers, on the other hand, asserted that they would be entitled to strike the railroads if the railroads bargained with the Firemen. The railroads and the Engineers sought to have the controversy resolved by requesting the National Mediation Board to determine which of the two unions was the bargaining representative of apprentice engineers. The Board, however, refused to make such a determination. The questions presented are:

1. Is the National Mediation Board authorized and required, by Section 2, Ninth, of the Railway Labor Act (45 U.S.C. § 152, Ninth) to determine which of the contending unions, if either, is the bargaining representative of apprentice engineers?

2. Is the Brotherhood of Locomotive Firemen and Enginemen, prior to resolution of the jurisdictional dispute between it and the Brotherhood of Locomotive Engineers, entitled

to require the railroads to bargain with it about the rates of pay, rules, and working conditions of apprentice engineers and, if agreement is not reached, to strike the railroads?

Statutes Involved

The statutory provision principally involved is Section 2, Ninth, of the Railway Labor Act (45 U.S.C. 152, Ninth). That provision, together with several other pertinent parts of the Act, is set forth in the appendix hereto at pages 42-50.

Statement

While the two lower courts were not in accord respecting the legal issues presented in this litigation, they did not disagree respecting the facts. Nor do we dispute in any material fashion those courts' statements of the facts. Accordingly, in this petition we draw our description of the case in the main from the District Court's detailed findings of fact and from the Court of Appeals' principal and concurring opinions.

1. *Summary of the case.* Petitioners are 6 railroads[1] whose situation in this case typifies most of the nation's Class I railroads. Respondents are the National Mediation Board and two labor unions that are locked in a jurisdictional dispute over apprentice locomotive engineer programs. Because of a need to supplement traditional sources of engineers, petitioner Louisville & Nashville Railroad ("L&N") decided to establish such an apprentice engineer program. It entered into a collective bargaining agreement respecting that program with the union that represents

[1] The Louisville & Nashville Railroad Company, the Southern Pacific Company, the Great Northern Railway Company, the Illinois Central Railroad Company, the Seaboard Coast Line Railroad Company (designated as Atlantic Coast Line Railroad Company in the proceedings below prior to the merger of that company with another railroad), and the St. Louis Southwestern Railway Company.

locomotive engineers, respondent the Brotherhood of Locomotive Engineers (the "Engineers"). Another petitioner, the Great Northern, later followed suit. Still other railroads, including the other petitioners, anticipated that they would eventually need similar apprentice engineer programs. The controversy producing this lawsuit arose because a second union, respondent the Brotherhood of Locomotive Firemen and Enginemen (the "Firemen"), which represents locomotive firemen, had also demanded the right to negotiate respecting the terms and conditions of apprentice engineer programs on the nation's railroads.[2] The Engineers threatened to strike the railroads if they negotiated with the Firemen. To avoid an impasse, both the railroads and the Engineers asked respondent the National Mediation Board ("NMB") to determine which union was entitled to negotiate on behalf of apprentice engineers. The NMB, however, concluded that it lacked statutory authority. The Engineers then commenced this litigation. The District Court held that the NMB was obliged to settle the controversy between the unions. Moreover, the court held that the Firemen could not require the carriers to negotiate with it unless and until the NMB determined that the Firemen's union was the bargaining representative of apprentice engineers. The Court of Appeals, however, reversed, being of the view that the NMB had no jurisdiction, that both unions could serve conflicting demands upon the carriers, and that either could strike if those demands were not met. In short, this litigation was generated by a jurisdictional dispute between two unions in which the carriers are caught in the middle unless the

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[2] After the hearing in this case, the Brotherhood of Locomotive Firemen and Engi.. .nen merged with several other unions to form the United Transportation Union. Since the record references are to the Brotherhood of Locomotive Firemen and Enginemen, however, for convenience we refer to that union in this petition rather than to its successor.

Court of Appeals' decision is set aside. In more detail, the facts are as follows:

2. *How the dispute arose.* For many years, there had generally been two employees assigned to work in the cabs of railroad locomotives, the engineer and the fireman. In the railroad industry, the representation of employees by labor organizations is on the basis of craft lines, and the engineers and the firemen have been recognized as two separate crafts. On each of the petitioner railroads, and on most of the railroads in the country, the firemen have been represented by respondent Firemen and the engineers by respondent Engineers. (App. *infra* pp. 22-23.)

The fact in which the current litigation is ultimately rooted is the technological obsolescence of the fireman's position brought about by the replacement of steam locomotives by diesel locomotives. In 1959, the railroads proposed that, since that development had eliminated the task of tending the fire in the engine, the fireman's position should be eliminated. This proposal, which was resisted by the Firemen, was followed by years of negotiation punctuated by reports of two presidential boards basically supporting the railroads' position.[3] Since those reports did not produce an agreement between the parties, and in the face of a threatened nationwide strike, the Congress in 1963 committed the problem to arbitration by yet a third presidential board. Public Law 88-108, 77 Stat. 132, 45 U.S.C. following § 157. The result was an award, commonly referred to as Award 282,[4] that permitted the carriers to eliminate up to 90% of the firemen positions, subject to

[3] The Presidential Railroad Commission, chaired by Simon H. Rifkind, and Emergency Board No. 154, chaired by Samuel I. Rosenman. See also the detailed history of the dispute, referred to by the Court of Appeals (App. *infra* p. 3), in *Brotherhood of Railroad Trainmen* v. *Akron & Barberton Belt R. Co.*, 385 F. 2d 581 (1967), *cert. denied*, 390 U.S. 923.

[4] The Board appointed pursuant to P.L. 88-108 was designated by the NMB as Arbitration Board No. 282, hence the term "Award 282."

provisions granting protection to existing employees. Accordingly, during the period since the effective date of Award 282 (January 25, 1964), the carriers have had the opportunity to, and have, substantially reduced the number of firemen.[5] (App. *infra* pp. 3, 23.)

This reduction in the firemen force also reduced the number of persons employed by the railroads who might be promoted to engineer. Prior to the arbitration award, the carriers had looked to the pool of firemen as their principal source of supply for engineers. After the award, it was clear that, to the extent the provisions of the award could be put into effect, that source would be reduced and another source might have to be tapped. (App. *infra* pp. 3, 23-25.)

In that connection, the Firemen in 1965 served upon the nation's railroads notices under Section 6 of the Railway Labor Act (45 U.S.C. § 156) proposing the establishment by agreement of an apprentice program for persons who would be trained to become engineers, and seeking to fix a variety of detailed features of the program.[6] (App. *infra* pp. 3-4, 26.)

The service of these notices triggered the acrimonious inter-union dispute that led to this litigation. Shortly after the notices were served upon the carriers, the Engineers union advised the carriers that the Firemen's notices en-

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[5] While Award 282 expired on March 31, 1966, the courts held that the rules established by the award continue in effect until changed pursuant to the procedures prescribed in the Railway Labor Act. *Brotherhood of Railroad Trainmen* v. *Akron & B.B. R.R. Co.*, 385 F. 2d 581 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 923 (1968).

[6] Section 6 requires that "[c]arriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rate of pay, rules, or working conditions." The first of these Section 6 notices was served in March of 1965 upon the L&N; the second in April upon the Southern Pacific; and the balance in November upon the other petitioners and more than 100 other carriers. (App. *infra* p. 26.) While there are some differences among these notices, those differences are not material. For the text of the notices, see the Appendix in the court below, pp. 50-69, 79-97.

croached upon its jurisdiction because it was entitled to represent apprentices training to become engineers, and that the carriers could not lawfully bargain with the Firemen. The Engineers union, in the words of the District Court, has "since [then] consistently maintained that position before the NMB and in this Court, as well as otherwise, and threatens to strike and engage in other self-help against any carrier that confers, negotiates, or otherwise agrees with the [Firemen's union] upon the merits of its apprentice notices." The Firemen's union, on the other hand, "has claimed and it now claims that its apprentice notices come within its jurisdiction . . . and that the carrier defendants and the other carriers served with the said notices are required by the Railway Labor Act to . . . bargain with the [Firemen] about the merits of the proposals made therein." Moreover, "[t]here is substantial likelihood that the [Firemen] . . . will engage in strikes or other self-help against the carriers . . . if the procedures of the Railway Labor Act are exhausted without an agreement being reached between the said carriers and the [Firemen]." (App. *infra* pp. 4, 27.)

On the L&N, the need for an apprentice engineer program materialized in early 1966, and accordingly that carrier set up such a program.[7] It recognized the Engineers as the designated and authorized bargaining representative for apprentice engineers and entered into an agreement with that organization. There is no indication that any of the apprentice engineers who have been employed by the L&N desire a different bargaining representative. (App. *infra* pp. 4-5, 9 n. 17, 14-15, 25.)

3. *The NMB's refusal to resolve the dispute.* Shortly

[7] So too did the Great Northern the following year (App. *infra* pp. 5, 26), so that the issues relating to the L&N relate also to the Great Northern. Since, however, the passages in the Court of Appeals' opinion respecting existing apprentice programs generally refer to the L&N, we follow suit in this petition.

thereafter, on June 6, 1966, the carriers that had been served with the Firemen's notice, including the L&N and the other petitioners, informed the National Mediation Board about the dispute between the two unions and sought its mediatory services so that the carriers might "be properly and legally informed as to which of the two disputing organizations may legally bargain for and on behalf of apprentice locomotive engineers." On June 21, 1966, the NMB declined this request on the ground that the "question as posed involved a question of representation," and that "[s]uch issues are resolved under Section 2, Ninth, of the Railway Labor Act" rather than under the provision—Section 5—governing mediation by the NMB. (App. *infra* pp. 5-6, 28-29).

But when the Engineers accepted this suggestion and applied to the NMB under Section 2, Ninth, for a determination of the controversy on the L&N, the NMB refused to act. On July 22, 1966, the NMB dismissed the application, stating that Section 2, Ninth, does not extend to a "jurisdictional dispute as such," and that "the dispute, if any exists, is not a representation dispute; but may involve an issue as to the right of the employees of one craft or class to do the work that is alleged to be that commonly done by employees of another craft or class. Procedures other than those outlined in Section 2, Ninth, of the Railway Labor Act are available to settle such disputes." (App. *infra* pp. 6, 30, 38-41.) A few days later, the Engineers filed another Section 2, Ninth, application, this one relating to the controversy on the Southern Pacific. At the same time, the Engineers asked the NMB to reconsider its dismissal of the application respecting the L&N and to tell the Engineers what "procedures" it had in mind "other than those outlined in Section 2, Ninth, [that] are available to settle such disputes." The NMB did not reply to either the Engineers' Southern Pacific application or its request for reconsideration and clarification. (App. *infra* pp. 6, 30-31.)

4. *The Sixth Circuit litigation.* In the meantime, on June 25, 1966, the Firemen sued the L&N in the United States District Court for the Western District of Kentucky, seeking to enjoin effectuation of the L&N's apprentice engineer agreement with the Engineers. On July 5, 1966, the court dismissed the action on the ground that it "involves a controversy between [the Firemen and the Engineers] . . . as to which of those organizations is the exclusive bargaining representative for and in behalf of the apprentice locomotive engineers employed by the L&N and this Court has no jurisdiction to determine that controversy, the determination of which is exclusively within the jurisdiction of the National Mediation Board." After the District Court judgment in the case at bar, but before the Court of Appeals judgment, the Court of Appeals for the Sixth Circuit affirmed the judgment of the Kentucky District Court on the same grounds as were given by that court. *Brotherhood of Locomotive Fire. & E. v. Louisville & N. R. Co.*, 400 F. 2d 572 (1968), *cert. denied*, 393 U.S. 1050. (App. *infra* pp. 5, 29.)

5. *Proceedings below.* Despite the decision of the Kentucky District Court, the NMB, at the Firemen's request, scheduled mediation on both the Southern Pacific and the L&N regarding the Firemen's Section 6 notices. The first, and so far only, mediation session was held on August 4, 1966. On that same day, the Engineers filed their complaint in the case at bar against the Firemen, the NMB, and the carriers. The Engineers sought an order requiring the NMB to resolve the jurisdictional dispute and barring the Firemen from compelling the carriers to negotiate unless the NMB confirmed the Firemen's right to bargain about apprentice engineer programs. The carriers' position was that they were willing to bargain with whatever union was the bargaining representative of apprentice engineers; that the NMB should make that determination; and that until it did the carriers could not be compelled to bargain with either union. (App. *infra* pp. 7, 28.)

The District Court resolved the issues in favor of the Engineers and the carriers. It held that the NMB was empowered and required by Section 2, Ninth, to determine which union was the bargaining representative of apprentice engineers, and that unless the NMB determined that that representative was the Firemen, the Firemen could not, by a strike or otherwise, force the carriers to bargain about the Section 6 notices relating to the apprentice engineer program. (App. *infra* pp. 31-35.)

The Court of Appeals, however, reversed for reasons we discuss in the subsequent portions of this petition.

Reasons for Granting the Writ

There can be little praise for the decision below in terms of its practical consequences. Two of the three judges of the Court of Appeals observed that the decision "places the carriers in the unhappy position of having to deal simultaneously with two rival unions whose bargaining demands will very likely conflict" and each of whom "will have the right to strike," so that the carriers "will be able neither to avoid nor to resolve a strike by agreeing with the striking union without the risk of violating its obligation not to depart unilaterally from its agreement with the other Union." Although those judges believed that this result was a "wholly unsatisfactory resolution," they thought that the existing "inadequate statutory scheme leaves the problems posed by this litigation 'falling between two stools.'" (App. *infra* pp. 17, 19). The Court of Appeals for the Fifth Circuit, in discussing the decision below, wryly observed: "[T]he Court may itself be giving its decision the characterization that it is bound to be right because it is so wrong in result." *Brotherhood of Locomotive Firemen & Enginemen* v. *Central of Georgia Ry.*, — F. 2d — (No. 23,815, May 2, 1969) (slip op. p. 3 n. 1).

This Court should, we urge, grant review so as to consider

whether there is indeed a gap in the Railway Labor Act that disables the NMB from resolving jurisdictional disputes of the sort here involved and that accordingly exposes the carriers, and the public, to the perils of conflicting demands of competing unions enforceable by the weapon of the strike. As we show below, there is solid basis for concluding that the Congress did not intend such a result and did not draft the Act so as to produce it. Moreover, as we also show, the questions presented are of widespread importance and the answers to those questions given by the Court of Appeals conflict with decisions both of this Court and of other Courts of Appeals.

A. The Jurisdiction of the NMB under Section 2, Ninth.

We deal first with the question respecting the jurisdiction of the NMB to resolve the controversy between the Firemen and the Engineers. The decision of the Court of Appeals on that issue is at odds with the views of other courts of appeals, departs from the Congressional purpose reflected in the legislative history, does not accord with prior NMB practice, and was not compelled by the language of the statute.

1. *The decision below conflicts with decisions of other courts of appeals.*

We have described above the litigation that the Firemen brought to enjoin enforcement of the apprentice training program established by the L&N, and have noted that the complaint was dismissed by the trial court, that the dismissal was affirmed by the Court of Appeals for the Sixth Circuit, and that certiorari was denied by this Court. Both lower courts were of the opinion that the dispute between the two unions was for the National Mediation Board to decide. *Brotherhood of Locomotive Fire. & E. v. Louisville*

& N. R. Co., 400 F. 2d 572 (1968). The Court of Appeals stated (*id.*, at 574-575):

> "The Railway Labor Act is a comprehensive statutory plan for resolving disputes between transportation companies and their employees. The Act looks toward the orderly resolution of disputes and sets up procedures whereby this goal may be accomplished. One of the things condemned by the Act is unilateral action by a party to an agreement which has the effect of changing the status quo established by the agreement. A United States District Court has jurisdiction to enjoin such action . . . .
>
> "However, there are certain types of disputes encompassed by the Act which may not be resolved by the courts. *One of these is a representation or jurisdictional dispute between labor unions . . . . Congress has conferred exclusive jurisdiction upon the National Mediation Board to resolve such disputes.*[1] *Section 2, Ninth, of the Railway Labor Act*, 45 U.S.C. § 152." (Emphasis added.)

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[1] *It is noted that the United States District Court for the District of Columbia has recently ordered the National Mediation Board to hear this dispute, the Board having originally declined to assume jurisdiction* [citing the decision of the District Court in the case at bar]."

That decision by the Sixth Circuit is squarely in conflict with the decision below. To be sure, in the Sixth Circuit case the relief sought was an injunction against the L&N rather than an order requiring Board action and precluding a strike by the Firemen, and the NMB was not a party to the Sixth Circuit litigation. However, the Sixth Circuit held that an injunction against the carrier could not be granted because the dispute between the Engineers and the Firemen as to the representation of apprentices on the L&N

was a jurisdictional dispute within the exclusive jurisdiction of the National Mediation Board under Section 2, Ninth. In the decision below, in contrast, the Court of Appeals held that the identical dispute between the Engineers and the Firemen was *not* within the jurisdiction of the Mediation Board. The two decisions are in conflict with respect to *the very same dispute.*

Nor has this disagreement between the two courts gone unnoticed by other courts. In the *Central of Georgia* decision cited above (p. 10), the Court of Appeals for the Fifth Circuit, after commenting upon the District of Columbia Circuit's recognition that its decision wrought undesirable results, concluded by saying: "To add to the confusion, this may put the D.C. Circuit in conflict with the Sixth's opinion," citing the *Louisville & Nashville* decision.

The Sixth Circuit's view respecting the scope of Section 2, Ninth, is shared by other courts, while the D.C. Circuit's is shared by none. The meaning of Section 2, Ninth, was first dealt with in an important way by this Court in three decisions in 1943. *Switchmen's Union v. Board,* 320 U.S. 297; *General Committee v. M.-K.-T. R. Co.,* 320 U.S. 323; *General Committee v. So. Pac. Co.,* 320 U.S. 338. The focus of those cases was upon the jurisdiction of the courts rather than upon the jurisdiction of the Board, and accordingly this Court was not called upon to delineate with specificity the types of jurisdictional disputes committed to the Board by Section 2, Ninth. However, this Court made it clear that the Board's mandate is broad. Thus, in the *M.-K.-T.* decision, the Court observed that it "is clear from the legislative history of § 2, Ninth that it was designed not only to help free the unions from the influence, coercion and control of the carriers but also to resolve a wide range of jurisdictional disputes between unions or between groups of employees." 320 U.S., at 336. Again, in *Switchmen's Union,* this Court stated that Section

2, Ninth, "was aimed not only at company unions which had long plagued labor relations . . . but also at numerous jurisdictional disputes between unions." 320 U.S., at 302.

That this Court was of the opinion that the type of jurisdictional dispute here involved—a determination whether a particular group of employees comes within one craft or another—fell under Section 2, Ninth, is disclosed by the later opinion in *Railroad Trainmen* v. *Howard*, 343 U.S. 768. There the Court held that a judicial remedy was available to train porters whose rights had been impaired by a racially discriminatory agreement between a carrier and a union by which they were not represented. In so concluding, the Court noted that there was no administrative remedy available to the parties because the dispute did not "hinge on the proper craft classification of the porters so as to call for settlement by the National Mediation Board under our holding in *Switchmen's Union* v. *National Mediation Board*. . . ." *Id.*, at 774. In remanding for entry of an injunction, the Court instructed the District Court to "bear in mind that *disputed* questions of reclassification of the craft of 'train porters' are committed by the Railway Labor Act to the National Mediation Board." *Id.*, at 775. (Emphasis in original.) But the case at bar *does* "hinge on the proper craft classification" of the apprentice engineers, and therefore should "call for settlement by the National Mediation Board."

The aftermath of the *Howard* decision places another Court of Appeals in opposition to the court below. After this Court's decision, the porters brought an action to require that they be included within the brakemen's craft. In affirming a dismissal of that action, the Eighth Circuit Court of Appeals stated that it had "every reason to believe that the Mediation Board, upon proper petition, would exercise its jurisdiction and competently determine any dispute" respecting the craft classification of the porters. *Howard*

v. *St. Louis-San Francisco Railway Company*, 361 F. 2d 905, 909 (1966).

Finally, we draw the Court's attention to *Southern Pacific Co.* v. *Switchmen's Union of North America*, 356 F. 2d 332, 335 (1965). There the Ninth Circuit Court of Appeals, in holding that a carrier was not required to bargain about a Section 6 notice that threatened encroachment upon the craft jurisdiction of another union, pointed to Section 2, Ninth, as the appropriate means for resolving the jurisdictional dispute: "That section, in providing for the certification of bargaining representatives, would seem necessarily to encompass the essential preliminary steps of fixing craft lines and of resolving any inter-union disputes in that respect." *Id.*, at 335. But the "fixing of craft lines" and the "resolving of any inter-union disputes in that respect" is what the court below held the NMB could *not* do in the case at bar.

2. *The decision below is not compelled by the language of Section 2, Ninth, and is at odds with both the legislative history of that provision and with the fundamental policies of the Railway Labor Act.*

The Court of Appeals concluded that the language of Section 2, Ninth, plainly precluded the NMB from resolving the jurisdictional dispute between the Engineers and the Firemen. We show below that the terms of the statute impose no such straitjacket upon the NMB. First, however, we discuss important considerations to which the court below evidently gave little, if any, weight—the basic policies of the statute and the legislative history of Section 2, Ninth.

a. *The policy of the Act and the legislative history of Section 2, Ninth.* This Court has "cautioned against a literal reading of congressional labor legislation; such legislation is often the product of conflict and compromise be-

tween strongly held and opposed views, and its proper construction frequently requires consideration of its wording against the background of its legislative history and in the light of the general objectives Congress sought to achieve." *Wirtz* v. *Bottle Blowers Assn.*, 389 U.S. 463, 468. Such an inquiry regarding the legislative history and underlying policy of labor legislation should be made even if the literal language of the statute may be said to "unambiguously embrace" a particular interpretation. *Woodwork Manufacturers* v. *NLRB*, 386 U.S. 612, 619. These principles are applicable to the Railway Labor Act as well as to other labor legislation. *Pennsylvania R. Co.* v. *Rychlik*, 352 U.S. 480, 488-489.

The "general objectives Congress sought to achieve" in the Railway Labor Act, as set forth in the statement of "General Purposes" in Section 2, focus upon the avoidance of "any interruption to commerce" by the "prompt and orderly settlement of all disputes," and upon the right of employees to organize and bargain through representatives of their own choosing. 45 U.S.C. § 151a. For the Congress to have failed to provide machinery for resolving jurisdictional disputes such as the one at hand would serve none of these purposes and could frustrate all of them. The settlement of such disputes would be left to a test of strength—to a contest as to which union could conduct the most damaging strike. Since the "major purpose of Congress in passing the Railway Labor Act was 'to provide a machinery to prevent strikes.'" *Texas & N.O. R. Co.* v. *Ry. Clerks*, 281 U.S. 548, 565, the Congress could hardly have intended such a result.

But it is not necessary to look solely to the general purposes underlying the Act, because clear legislative history supports petitioner's reading of Section 2, Ninth, whereas none supports the Court of Appeals' reading. Section 2, Ninth, was added to the Act by the 1934 amendments (48 Stat. 1185, 1188), which were drafted by Joseph B. Eastman,

then the Federal Coordinator of Transportation. He made entirely plain in his testimony that disputes of the sort involved here would be disposed of under Section 2, Ninth. Thus, for example, he was asked how "a conflict of jurisdiction as to classes and crafts . . . in the classification of employees" would be resolved, the illustration given being that of whether a person installing metal window frames should be considered for jurisdictional purposes as "a carpenter or a sheet-metal worker." He responded: "It is the intent that that would be handled under the paragraph ninth that I have discussed." *Hearings on H.R. 7650, House Committee on Interstate and Foreign Commerce*, 73d Cong., 2d Sess., at p. 57. And at another point, when asked whether the Act's failure to define "craft or class" might "create disputes between the different classes of employees as to the jurisdiction of each," Mr. Eastman replied that "that matter is sufficiently covered by the provisions of the ninth paragraph, which . . . provides the tribunal which shall have power to consider and determine such disputes." *Id.*, p. 45. These descriptions of jurisdictional controversies — "a conflict of jurisdiction as to classes or crafts," "disputes between the different classes of employees as to the jurisdiction of each"—fit perfectly the dispute in the case at bar between the Firemen and the Engineers.

It was this testimony, together with other statements by Commissioner Eastman, that led this Court to conclude in *General Committee* v. *M.-K.-T. R. Co.*, 320 U.S. 323, 336, that Section 2, Ninth "was designed . . . to resolve a wide range of jurisdictional disputes between unions or between groups of employees." According to the testimony of the drafter of the provision, that "wide range" was meant to include precisely the type of dispute presented to the NMB in this case.

b. *The statutory language, Board practice and regulations.* In the face of this legislative history and substantial

contrary authority from this Court and other courts of appeals, and with acknowledgement by a majority that the result was "wholly unsatisfactory," the Court of Appeals concluded that nevertheless there was no escape from the words of Section 2, Ninth—that these words precluded action by the Board. Quoting the statutory language, the Court observed that, under Section 2, Ninth, the Board has authority to act only where a "dispute shall arise among a carrier's employees as to who are the representatives of such employees." The Court reasoned that, as to the controversy on the L&N, the statute was inapplicable because there was no "dispute *among* the apprentices over who represented them." Rather, the "apprentices were to be represented by the Engineers. The carriers thought so, the union thought so, and apparently the apprentices thought so." To be sure, there "was undoubtedly a dispute between the two unions," and "[i]n that the unions represent their members, this was a dispute among employees of the carrier." "But no single employee was in dispute with another employee over who did or should represent a group to which they jointly belonged." And the same conclusion applied to the carriers where no such group had as yet come into being: since there were no apprentice engineers, obviously there could not be a dispute among them. (App. *infra* pp. 14-15.)

Such a restriction of NMB jurisdiction under Section 2, Ninth, by a literal reading of the first phrases in the section cannot survive analysis, for it would in a variety of situations frustrate the evident purposes of the provision. Thus, if the court's rationale were consistently applied, the NMB would be powerless to certify a representative that is the *unanimous* choice of a carrier's employees because there would be no "dispute among employees" at all. So also, where employees are divided not between rival unions but between the supporters of one union and the supporters of

no union, the NMB would not be authorized to certify the majority's preference, because the dispute would not be as to "who" the representative should be—the word used in the statute—but as to whether there should be a representative at all. Quite naturally, the NMB has itself perceived the vice of such an approach to the interpretation of Section 2, Ninth. If such an approach were accepted, the Board has said, "[i]n order for the employees to secure representation rights in such a situation it would be necessary for them to artificially create a dispute by injecting another contender for representation to secure services of the Board and a certification. This clearly is contrary to the Act which was enacted to promote peaceful settlements not foment disputes." *Northwest Airlines, Inc.*, 2 NMB 19, 23 (1948).[8]

Not only is the rationale of the Court of Appeals impossible of consistent application, but it is internally flawed. While in our view the statute should not and cannot sensibly be approached by way of an effort to give a precisely grammatical meaning to each of its terms, the fact is that such an approach in this case should have confirmed, rather than precluded, NMB jurisdiction. This is why that is so:

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[8] Citations to "NMB" are to the three volumes of "Determinations of Craft or Class of the National Mediation Board," which the Board has published at irregular intervals.

In *Northwest Airlines, Inc., supra*, the Board expressly rejected a challenge to its jurisdiction under Section 2, Ninth, where there was only one union seeking recognition. Later, in *Texas & Pac. Ry.*, 2 NMB 234 (1952), the Board certified a union whose application under Section 2, Ninth, was supported unanimously by the employees in the craft or class. In *Lakefront D. & R.T. Co.*, 2 NMB 101 (1948), the Board found "that a representation dispute existed" where the relevant craft or class consisted of but one employee, whose chosen representative the carrier refused to recognize. See also *St. Paul Union Depot Co.*, 1 NMB 181 (1940), *injunction against enforcement rev'd sub nom. Brotherhood of Ry. & S. S. Clerks v. United Transport Service Employees*, 320 U.S. 715. Unanimity in representation "disputes" occurs surprisingly often; in the last year (May 1968-April 1969), the Board issued certifications in at least 10 cases in which the employees voted unanimously (Case Nos. R-4003, 4006, 4027, 4031, 4032, 4036, 4042, 4049, 4063, 4069).

In the final analysis, the Court of Appeals' construction of Section 2, Ninth, rests on a literal reading of but a single word: "such." As the Court acknowledged with respect to the L&N, there was a dispute "among employees"—the engineers and the firemen—as to who should represent the apprentice engineers. But the Court found that not enough. The statute requires that there be a dispute among employees as to who shall represent "such employees." That phrase, the Court concluded, means that the dispute must exist among the employees whose representation is in question—in this case, among the apprentice engineers themselves.

The point the Court missed is that in order to determine whether there is a dispute "among employees" as to who shall represent "such employees," the Board is called upon at the outset to draw craft lines, for otherwise there is no way of knowing the limits of the relevant group. As the Ninth Circuit Court of Appeals said in the *Southern Pacific* decision, *supra*, p. 15, Section 2, Ninth, "in providing for the certification of bargaining representatives, would seem necessarily to encompass the essential preliminary steps of fixing craft lines and of resolving any inter-union disputes in that respect." 356 F. 2d, at 335. Thus, for example, if on the L&N the apprentices were treated as part of the firemen's craft, then there would be a dispute "among employees" as to which union should represent "such employees"—*i.e.*, the firemen and the apprentices considered as a group. It was just such a drawing of craft lines to place the apprentices either in the firemen's or the engineers' craft that the Engineers union sought from the NMB, and it was just such a drawing of craft lines that the NMB had to make in order to determine whether an election or "any other appropriate method" of identifying the proper representative of apprentices was necessary. The turnabout here is that the NMB, which should have resolved the craft line issue, did not; but the court, which had no authority

to resolve that issue, did. That is, in holding that there was not a dispute "among employees" as to who should represent "such employees" because there was not a dispute among the "group" (as the court put it) of apprentices, the court itself carved out the relevant class of employees and somehow decided that the class included only apprentices.[9]

Finally, we note that the prior practice of the NMB does not support the decision below. The only specific mention of that practice in the opinions of the court below was in connection with the NMB's regulations. But those regulations are additional evidence that, in disputes as to which there is a question as to craft lines, the NMB is obliged to draw those lines at the outset. Thus the regulations provide that an application under Section 2, Ninth, "should be accompanied by signed authorization cards from at least *a majority of the employees composing the craft or class involved in the dispute.*" 29 C.F.R. § 1203.2. (Emphasis added.)[10] Moreover, if certiorari is granted we would show that the actual course of prior administrative determina-

[9] As to those railroads that had not actually employed apprentice engineers, there is the additional question whether the term "employees" in Section 2, Ninth, can in appropriate circumstances be construed to include persons not yet hired. The statute does not answer this question explicitly. Accordingly, for the reasons we have already given, the issue should be resolved on the basis of other considerations. The dilemma produced by conflicting demands of two unions is just as real, and threatens precisely the same consequences, whether those demands involve existing or prospective employees. Accordingly, if due regard is to be given the policies of Section 2, Ninth, it should be read broadly to confer jurisdiction upon the NMB to resolve all jurisdictional disputes turning upon craft line determinations. In any event, as we show in the next portion of this petition, if the NMB did not have jurisdiction as to the disputes on some of the railroads because no apprentices had been hired, then neither could the Firemen compel the carriers to bargain respecting the terms of employment of a non-existent group of employees. Pp. 28-29, *infra*.

[10] Quite properly, the Court of Appeals did not regard the formal absence of authorization cards as independently supporting the NMB's dismissal of the Engineers' applications, nor did the NMB in its order refer to that absence. The submission of cards would simply have embroidered by additional and unnecessary documentation the substance of the dispute that was presented: a dispute among employees as to the drawing of craft lines.

tions under Section 2, Ninth, does not conform to the decision of the Court of Appeals, but rather that the NMB has settled jurisdictional disputes by drawing craft lines in situations indistinguishable from the case at bar.[11]

B. The Right of the Firemen To Compel the Carriers To Bargain About Apprentice Engineer Programs

The Court of Appeals' holding that both the Firemen and the Engineers were entitled to require the carriers to bargain about apprentice engineer programs is radically out of line with what we understand to be the Railway Labor Act's scheme of collective bargaining through representatives chosen by a majority of the employees in each craft or class. The holding markedly restricts this Court's landmark opinion in *Virginian Ry.* v. *Federation*, 300 U.S. 515,

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[11] Among the reported decisions of the NMB are many in which the Board has resolved jurisdictional disputes between unions by drawing the relevant craft lines (1) without giving weight to the existence or not of controversy among the employees whose representation was at issue, (2) without first inquiring whether a decision one way or the other might cause a change in the representative of one of the crafts, and (3) often without the necessity of a subsequent election. See, *e.g.*, *Chicago, N.S. & M.R.R.*, 3 NMB 101 (1953); *Kansas City Term. Co.*, 2 NMB 238 (1953); *Chicago & N.W. Ry.*, 2 NMB 169 (1949); *American Airlines, Inc.*, 2 NMB 3 (1953); *Union R.R.*, 1 NMB 336 (1946); *St. Paul Union Depot Co.*, 1 NMB 181 (1949), *injunction against enforcement rev'd sub nom. Brotherhood of Ry. & S.S. Clerks* v. *United Transport Service Employees*, 320 U.S. 715; *Wabash Ry.*, 1 NMB 90 (1938). The single area in which the NMB has sometimes been unwilling to decide disputes involving only the determination of craft or class lines is where the relevant lines have theretofore been drawn by agreement between the two unions, and one of the unions has then sought to undo the agreement through proceedings under Section 2, Ninth. In such cases, the Board has dismissed the application without making the requested craft or class determination, observing that the procedures of Sections 3 and 6 of the Act (45 U.S.C. §§ 153, 156) are available for securing interpretations and changes of agreements. See *Delaware & H.R.R.*, 1 NMB 270 (1943); *Chicago & N.W. Ry.*, 1 NMB 130 (1938), *denial of injunction against enforcement aff'd sub nom. Brotherhood of R. Trainmen* v. *National M. Board*, 135 F. 2d 790 (D.C. Cir. 1943). *But see Chicago N.S. & M.R.R., supra.* The case at bar does not, of course, fall within that category.

and casts doubt on a major body of decisions that has developed in the generation since *Virginian Ry.* was decided.

The statutory structure of collective bargaining through representatives of crafts or classes of employees is built on several sections of the Act: Section 6 (45 U.S.C. §156), which requires "representatives of employees" to give "notice of an intended change in agreements affecting rates of pay, rules, or working conditions"; Section 2, Fourth (45 U.S.C. § 152 Fourth), which provides that "[t]he majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class"; Section 2, Third (45 U.S.C. § 152 Third), which enjoins that neither union nor carrier "shall in any way interfere with, influence, or coerce the other in its choice of representatives"; and Section 2, Ninth (45 U.S.C. § 152, Ninth), which furnishes an administrative procedure for determining the identity of the employees' representative and obliges the carrier to "treat with the representative so certified [by the NMB] as the representative of the craft or class for the purposes of this Act."

The fundamental principles which we understand the courts to have inferred from this structure are these: that, where the identity of the employees' bargaining representative is indubitably established, the carrier must bargain with that representative and with no other; and that where there is substantial doubt as to the identity of the representative, the carrier cannot be compelled to bargain with a union on the basis of a claim that it *may* be the representative of the employees.

The judicial development of these principles commenced with *Virginian Ry.*, the leading case in which this Court considered the nature of a carrier's obligation under Section 2, Ninth, to "treat with" the authorized employees' representative. Insofar as here relevant, this Court held that this obligation is exclusive, so that the carrier must not negotiate

with any union other than the one duly authorized to represent a particular craft or class of employees:

> ". . . Both the statute and the decree are aimed at securing settlement of labor disputes by inducing collective bargaining with the true representative of the employees *and by preventing such bargaining with any who do not represent them*. The obligation imposed on the employer by § 2, Ninth, to treat with the true representative of the employees as designated by the Mediation Board, when read in the light of the declared purposes of the Act, and of the provisions of § 2, Third and Fourth, giving to the employees the right to organize and bargain collectively through the representative of their own selection, is exclusive. It imposes the affirmative duty to treat only with the true representative, *and hence the negative duty to treat with no other* . . . [T]he injunction against petitioner's entering into any contract concerning rules, rates of pay and working conditions, except with respondent, is designed only to prevent collective bargaining with anyone purporting to represent employees, other than respondent, who has been ascertained to be their true representative . . . ." 300 U.S., at 548-549. (Emphasis added.)

For years, *Virginian Ry.* has been the unchallenged authority in this area of the Act, establishing the rule that the authorized bargaining representative is the exclusive representative of all members of the craft. In this Court, see, *e.g.*, *Machinists* v. *Street*, 367 U.S. 740, 759-760; *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 728; *Steele* v. *L. & N. R. Co.*, 323 U.S. 192, 200; *General Committee* v. *M.-K.-T. R. Co.*, 320 U.S. 323, 335.

Building on the principle of *Virginian Ry.*, the courts have held that a Section 6 notice is invalid and nonbargainable if it is served by a union which is not the authorized repre-

sentative of the employees whose rates of pay, rules, or working conditions would be affected by the proposal. *Southern Pacific Co.* v. *Switchmen's Union of North America*, 356 F. 2d 332 (9th Cir. 1965); *Order of Railway Cond. & Brake.* v. *Switchmen's Union*, 269 F.2d 726, 730-732 (5th Cir. 1959); *cf. Switchmen's Union* v. *Southern Pacific Company*, 253 F. 2d 81, 84 (9th Cir. 1958); *Brotherhood of Railroad Trainmen* v. *Smith*, 251 F.2d 282, 287 (6th Cir. 1958).

It is clear from the foregoing authorities that if the Engineers union had been *certified* by the NMB as the representative of the apprentice engineers, the Firemen's union could not have required the carriers to bargain with it about apprentice engineer programs. But the Court of Appeals concluded that *Virginian Ry.* was not controlling because the "Mediation Board has not certified which union is the true representative of 'apprentice locomotive engineers.'" "In such a situation," the Court said, "any union for whom future apprentices were 'fairly claimable' as part of that union's craft or class could legitimately bargain with the carriers about the terms and conditions under which such future engineers would work." And the Firemen qualified under that test, for they "had a reasonable expectation that they might finally represent at least some future employees falling within the as yet largely empty category of 'apprentice engineers.'" (App. *infra* p. 9) [12]

This holding, which confines *Virginian Ry.* to its precise

[12] The concurring judges indicated uncertainty as to exactly how far the Firemen's "bargainable interest" would extend (App. *infra* p. 18-19). That does not affect the principle involved, however, for even under the concurring judges' view it is clear that the result is the subjection of the carriers to overlapping demands from two rival unions respecting the apprentice engineer program. Thus, the concurring judges said: "Today's result places the carriers in the unhappy position of having to deal simultaneously with two rival unions whose bargaining demands will very likely conflict if a high order of union statesmanship is not forthcoming" (App. *infra* p. 19).

facts, seriously undermines the principle of that decision and also serves to aggravate the vice of the court's other holding, that the NMB did not have power under Section 2, Ninth, to settle the dispute between the Firemen and the Engineers. The way in which it does is perhaps most apparent with respect to the L&N, which had actually employed apprentice engineers. The Court of Appeals noted that those apprentices were all evidently satisfied with their representation by the Engineers, and the court was careful to say that it did not "cast doubt on the Engineers' status as representatives of the apprentices actually employed by the L&N" (App. *infra* p. 9 n. 17). In those circumstances, prior to the decision below surely it would have been at least arguable that the *Virginian Ry.* rule of exclusive bargaining would apply to such a situation as well as to the situation in which the representative is formally certified by the NMB. But under the Court of Appeals' decision not only was *Virginian Ry.* inapplicable because of the absence of certification, but it could *never* be applicable because certification was impossible. And, as we have already discussed, certification was impossible not because the Engineers did not command *enough* support among the apprentices, but because they commanded *too much* support. So much that, as the Court viewed it, there was no "dispute among" them such as to permit certification under Section 2, Ninth.

Thus, under the Court of Appeals' analysis, if only the Engineers union had been able to manufacture a dispute among the apprentices as to their representative, it could have applied for an election under Section 2, Ninth; the Board could have taken jurisdiction; it might have drawn the engineers' craft line so as to include the apprentices; it would then have certified the Engineers; and that would have brought *Virginian Ry.* into play so that the carrier would have been obliged to deal with the Engineers and not

with the Firemen. But as there was no dispute among the apprentices so that the NMB could not formally certify the Engineers, *Virginian Ry.* was inapplicable and both unions could serve conflicting demands. With all deference, we suggest that this is a bizarre result that this Court could not have contemplated in *Virginian Ry.*

The only other Court of Appeals that has substantially considered a carrier's obligation under the Railway Labor Act when faced with conflicting bargaining demands from two different unions has come to a conclusion exactly opposite to the decision below. *Ruby v. American Airlines, Inc.*, 323 F.2d 248 (2d Cir. 1963); *Flight Engineers Inter. Ass'n v. Eastern Air Lines, Inc.*, 311 F.2d 745 (2d Cir. 1963). *Eastern* involved a dispute between two unions as to which craft encompassed so-called "pilot-engineers." One union sued to require the carrier to bargain with it and not with the other union. The Court of Appeals denied relief, stating: "Where there is doubt as to representation and where there are rival jurisdictional claims, those doubts are to be resolved and the claims are to be vindicated or rejected not by the courts but by the administrative and other processes provided by the [Railway Labor] Act . . . ." 311 F.2d, at 747. In *Ruby*, there was a dispute between two unions as to which was entitled to represent the pilots on a particular airline. One of the contending unions applied to the NMB for an investigation under Section 2, Ninth, and submitted authorization cards from 84% of the pilots. While the representation dispute was pending before the NMB, the other union, which had theretofore been recognized by the carrier as the pilots' representative, sued to restrain the airline from dealing with the union that had secured the 84% authorizations. The Court of Appeals held that relief could not be granted, because "the courts cannot properly require an employer to bargain with a previously designated representative in the face of a substantial representation dispute

requiring the intervention of the Mediation Board under § 2, Ninth . . . ." 323 F.2d, at 225. But under the approach of the Court of Appeals in the case at bar, the result would have been quite different if the union applying for certification had had 100% support by the pilots instead of 81%. In that event, the NMB would have had no jurisdiction to conduct Section 2, Ninth, proceedings; *Virginian Ry.* accordingly would not have been applicable; and the carrier would have been obliged to bargain with both unions. Since these were not the facts in *Ruby*, perhaps technically there is not a conflict of decisions. But we suggest it is not possible to read *Ruby* and *Eastern* and believe that the Second Circuit shares the view of the Court below.

In both *Ruby* and *Eastern*, each of the contending unions might be said to have had a reasonable expectation that it might at some time in the future be confirmed in its right to represent the employees in question. Yet in neither case did the court suggest that such an expectation might give rise to a duty on the part of the carrier to bargain with both unions. Nor in the cases cited earlier, p. 23, where Section 6 notices going beyond the craft jurisdiction of the seeking union were held to be invalid, did the courts pause to inquire whether the union might have a "fairly claimable" right to represent the craft. It was enough that it did not represent the craft when it served the Section 6 notice. In contrast, in the case at bar the Court of Appeals concluded that the carriers were obliged to bargain with the Firemen even though the most that could be said about the Firemen's title was that it was "fairly claimable" and even though on the L&N all of the apprentices, so far as appears, were content to be represented by the Engineers.

There is, finally, another aspect of the lower court's decision that deserves review. The Court of Appeals, as we have noted, held that, as to carriers which had not employed apprentice engineers, there could be no Section 2, Ninth

determination by the NMB because there could be no dispute "among" non-existent "employees" within the meaning of that provision. But if that is so, then the Firemen were not entitled to serve a Section 6 notice relating to a program for non-existent apprentice engineers. If there are no "employees" for purposes of Section 2, Ninth, then there are no "representatives of [such] employees" within the meaning of Section 6, relating to proposals "affecting rates of pay, rules or working conditions", nor are there "representatives designated and authorized ... to confer by the employees" within the meaning of Section 2, Second, dealing with the obligations of carriers to confer; nor is there a dispute between "an employee or group of employees" and a carrier within the meaning of Section 5 relating to mediation by the NMB.

Had the Court of Appeals so held, the final result might have been considered acceptable. A carrier could then unilaterally establish an apprentice engineer program but once apprentices were employed there would be "employees" within the meaning of all provisions of the Act. That is, there could be a "dispute among employees" within the meaning of Section 2, Ninth, and there could be "representatives of employees" authorized to make proposals and insist on bargaining with the carrier. But as the decision below stands, the carriers must bargain with two unions respecting non-existent employees while at the same time the NMB is disabled from resolving the jurisdictional dispute, because the employees are non-existent. Surely this result is at odds with common sense and does not reflect a reasonable interpretation of what should be regarded as integrated statutory provisions.

Finally, the cases decided upon the authority have laid down as basic rules of the Railway Labor Act that a union has rights only as the representative of a craft of existing employees and that there can be only one true

resentative of a craft—the union selected by the majority of members of the craft. The decision below unjustifiably limits *Virginian Ry.* and undermines the entire body of relevant lower court case law that has developed over the last several decades.

C. Importance of the Issues Presented.

Jurisdictional disputes are among the most intractable of all labor controversies. They bear with special harshness upon employers, who cannot settle with one contestant without risking a strike by the other. And when that risk of strike involves the nation's railroads or airlines,[13] the public interest is importantly engaged. Moreover, in the railroad industry, the potential incidence of this sort of controversy is especially large, for the employees are divided into some 28 crafts which are represented by some 38 national, and innumerable smaller, unions whose claims often overlap and whose relationships have not always been tranquil.[14]

The Congress perceived the threat to the public interest posed by these inter-union struggles.[15] As this Court has observed, Section 2, Ninth, was enacted "to resolve a wide range of jurisdictional disputes between unions or between groups of employees." *General Committee* v. *M. K. T. R. Co.*, 320 U.S. 323, 336. But the Court left open the exact delineation of that "wide range." This is the first decision since *M. K. T.* in which a Court of Appeals has determined

[13] Section 201 of the Act (45 U.S.C. § 181) extends the coverage of most of the other provisions, including Section 2, to interstate common carriers by air.

[14] NMB, 34th Ann. Rep. Table 10 at 81-89 (1968). On the airlines, there are 9 crafts or classes represented by 13 national, and a number of local, unions. *Ibid.*

[15] It should be noted that under the Labor-Management Relations Act, a dispute of the sort here involved would be resolved by the NLRB in a unit clarification proceeding, which is essentially what the Engineers sought in the court at bar. See *Colgate-Palmolive-Peet Co.*, 138 NLRB No. 31, 1968 2 CCH NLRB ¶ 20,244; *Wallace-Murray Corp.*, 373 U.S. 261, 268; *Wallace-Murray Co.*, 173 NLRB No. 31, 1968 2 CCH NLRB ¶ 20,244.

that a particular type of jurisdictional dispute *cannot* be resolved under Section 2, Ninth. Thus the decision establishes a new type of labor "no man's land" in which the companies are caught between the demands of competing unions and in which none of the three parties can secure relief from either the courts or from the administrative agency charged with resolving other sorts of jurisdictional disputes. This is quite enough to invest the decision with considerable importance.

Moreover, the type of dispute falling in this newly devised "no man's land" will be neither infrequent nor unimportant. All that is needed is a group of employees as the prize and two unions with "fairly claimable" craft rights to assert. There are, for example, many groups of subordinate officials (supervisory employees) and professional and technical employees who are not now represented by unions. When the unions that already hold representation rights in allied crafts learn the lesson of the decision below and serve conflicting Section 6 notices requiring recognition as the representative of such employees, another jurisdictional dispute akin to the instant dispute will arise. The examples could be multiplied. Indeed, as the ruling respecting the L&N discloses, even employees that are already represented are fair game, at least until their union has been certified and many have not been.

It is probably a good guess, however, that the decision below will find its widest application, not to jurisdictional disputes respecting employees of a type that have been around for a long time, but rather to disputes over new types of employees brought into being by the impact of advancing technology on traditional work functions. Thus, the introduction of the diesel locomotive eliminated the need for firemen, but the reduction in the number of firemen quite predictably produced a scramble between the Engineers and the Firemen as to which union could control new

sources of engineers. One can just as easily foresee competition between the conductors and the engineers when trains are able to be run by remote control. Will the controllers be within the one craft, within the other, or a separate craft? And in *Transportation Union v. U.P. R. Co.*, 385 U.S. 157, where a new group of employees had been trained to operate computers that integrated work theretofore done by two different crafts of employees, the situation would have been the same as in the case at bar if the contending unions had not been able to rely upon their respective contracts so that this Court could order tripartite arbitration by the National Railroad Adjustment Board under Section 3 of the Act (45 U.S.C. § 153).

Heretofore, the NMB has responded on occasion with marked flexibility to developments such as these, by carving out new crafts or classes where the purposes of the Act seemed to call for them,[10] merging old crafts whose distinction seemed to be no longer valid,[11] and expanding existing crafts to encompass employees whose work was unknown when the craft lines were originally drawn.[12] The decision below will narrow considerably the instances in which the Board will be able to resolve by administrative order jurisdictional disputes arising out of changing technology and evolving operational concepts. Yet these are the disputes that are especially virulent, because for the union whose traditional craft work is being overtaken by technological or other change, the Firemen whose members are

displaced by diesel locomotives, the Telegraphers whose members are displaced by computers—acquisition of replacement members through additional representational rights is regarded as a life or death matter. It is precisely these sorts of disputes that are most likely to be committed by the decision below to resolution by economic warfare in which the carriers cannot protect themselves even by surrender.

We urge that this Court grant plenary review to determine whether this is indeed the course staked out by the Congress in the Railway Labor Act.

Conclusion

For the reasons stated, a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,050

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
Appellant

v.

NATIONAL MEDIATION BOARD, *et al.*, Appellees

No. 22,185

NATIONAL MEDIATION BOARD, Appellant

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, Appellee

Appeals from the United States District Court
for the District of Columbia

Decided March 14, 1969

Mr. Joseph L. Rauh, Jr., with whom *Messrs. John Silard, Daniel H. Pollitt, Isaac N. Groner, Alex Elson, Willard J. Lassers* and *Aaron S. Wolff* were on the brief, for appellant in No. 22,050.

Mr. Walter H. Fleischer, Attorney, Department of Justice, with whom *Assistant Attorney General Edwin L. Weisl, Jr.* and *Mr. John C. Eldridge*, Attorney, Department of Justice, were on the brief, for the National Mediation Board, appellant in No. 22,185 and appellee in No. 22,050.

Mr. Francis M. Shea, with whom *Messrs. Richard [illegible] Conway, David W. Miller* and *James A. Wilcox* were on the brief, for railroad appellees in No. 22,050.

Mr. Barclay D. McMillen, with whom *Mr. Harold A. Ross* was on the brief, for appellee Brotherhood of Locomotive Engineers.

Before BURGER, WRIGHT and TAMM, *Circuit Judges*.

WRIGHT, *Circuit Judge*: The judgment of the District Court under review here relieves certain railroad companies of any duty to bargain over a proposal submitted to them by the Brotherhood of Locomotive Firemen and Enginemen (the Firemen), and enjoins the Firemen from striking to force such bargaining. The District Court has viewed the Firemen's proposal as creating a representational dispute with the Brotherhood of Locomotive Engineers (the Engineers), rather than as a matter for collective bargaining with the railroads, and has ordered the National Mediation Board to decide the dispute under Section 2, Ninth, of the Railway Labor Act.[1] We reverse.

I

For many years, the railroad industry has recruited virtually all locomotive engineers from the ranks of locomotive firemen. As firemen have moved up the seniority ladder within their craft, they have learned the skills of an engineer while working in the locomotive cab. They have taken examinations administered by the carriers, and those who passed the examinations have, in the order of their seniority as firemen, gained status as engineers. Persons newly qualified as engineers have not normally been immediately employed as such; rather they have continued to work as firemen until the demand for active engineers has reached far enough down the seniority list of that craft to encompass them. With seasonal fluctuations in the demand for

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[1] 45 U.S.C. § 152, Ninth (1964). The District Court's findings of fact, conclusions of law and decree are reported in *Brotherhood of Locomotive Engineers* v. *National Mediation Board*, D. D.C., 284 F.Supp. 344 (1968).

engineers, the employees at the bottom of the engineer seniority list "ebb and flow" back and forth between serving as engineers and as firemen.

Both the Engineers' and the Firemen's unions have included in their collective agreements with the carriers provisions regulating the progress of employees from fireman to engineer, including the process of "ebb and flow" for those employees near the bottom of the engineer list and near the top of the fireman list. Most engineers have a fireman's seniority number as well as an engineer's number, and many locomotive enginemen are members of both the Firemen's and the Engineers' unions.

Recent events have made it no longer possible for all new engineers to be supplied from the ranks of active firemen. In 1959 the carriers proposed to eliminate the position of fireman for freight and yard service, a proposal which the Firemen resisted. After winding its way through the mediatory procedures of the Railway Labor Act for some years without resolution, the dispute threatened to erupt into a strike in 1963. At that point Congress determined to settle the dispute by compulsory arbitration; Board 282 was established, with power to bind the parties to its resolution of the disputed issues for a two-year period. Board 282's award permitted the carriers to eliminate up to 90 per cent of the firemen's jobs in freight and yard service. While the award was in effect (between early 1964 and early 1966), the carriers managed to eliminate about 18,000 firemen's jobs, far more than had been expected.[2]

Such a large scale elimination of firemen made it clear that further sources of new engineers would have to be found for the future. In early 1965 the Firemen's union, operating from the premise that the craft's traditional role

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[2] A fuller history of the dispute summarized here can be found in this court's opinion in *Brotherhood of Railroad Trainmen v. Baltimore & Ohio R. Co.*, 128 U.S.App.D.C. 59, 385 F.2d 581 (1967), *cert. denied*, 390 U.S. 923 (1968).

as supplier of engineers gave it a bargainable interest in future engineer training programs. proposed apprenticeship plans to the Louisville & Nashville and Southern Pacific Railroads under Section 6 of the Railway Labor Act.[3] In November 1965 the Firemen proposed similar plans under Section 6 to over a hundred other rail carriers.

Service of these notices provoked objection from the Engineers union. The Engineers claimed to be the exclusive representative of any future apprentice engineers, and asserted exclusive bargaining jurisdiction over all programs for training engineers. They warned the carriers not to bargain with the Firemen over the proposed plan. When the carriers did not reply to the Firemen's Section 6 notice, the Firemen sought the mediatory services of the National Mediation Board under Section 5 of the Act,[4] and the Board docketed the request and scheduled mediation between the Firemen and the L & N and Southern Pacific companies.

In the meantime, the L & N negotiated an agreement with the Engineers for an apprenticeship program, the

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[3] 45 U.S.C. § 156 (1964)

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions. . . ."

[4] 45 U.S.C. § 155 (1964)

First Disputes within jurisdiction of Mediation Board.

"The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

. . . . . .

"In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. . . ."

details of the program to be left to management discretion. The Engineers were recognized by the railroad as the bargaining representative for the new class of apprentices. Since the bringing of this suit in the District Court, the Great Northern Railway Company has entered into a similar agreement with the Engineers and very recently has set in motion its own apprentice program.

The Firemen objected to the L & N entering into an agreement with the Engineers before it bargained with the Firemen concerning their similar proposal. They brought suit in the Eastern District of Kentucky to enjoin the implementation of the Engineers L & N agreement. The court dismissed the suit for want of jurisdiction. That judgment was affirmed by the Sixth Circuit on the ground that the case involved a jurisdictional dispute which, under applicable Supreme Court precedents, was for the National Mediation Board to decide (at most) it could be decided in any official forum.[1]

The carriers, arguing that they were caught in a dilemma by the competing claims of the rival unions, sought the mediatory services of the National Mediation Board under Section 5:

> "in order that they may be properly and legally informed as to which of the two disputing organizations may legally bargain for and on behalf of apprentice locomotive engineers."

The Board declined the carriers' request for mediation, stating that "[t]he question as presented involved a question of

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[1] *Brotherhood of Locomotive Engineers & Firemen's Journals v. Louisville & N. R.R. Co.*, 373 F.2d 32 (1967), *cert. denied*, 389 U.S. 1044, 88 S.Ct. 787, 19 L.Ed.2d 836 (January 29, 1968).

[2] The carriers in question were the L & N and the Southern Pacific, the first two carriers upon which the Engineers had served their § 6 notices. Both had refused to bargain with the Firemen over such notices.

are the representatives of such employees, within the meaning and intendment of Section 2, subd. Ninth of the Railway Labor Act . . . ."

II

The view that the Firemen can bargain about the content of an apprenticeship program only if they represent the apprentices is based on an overextension of *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515 (1937). In *Virginian Railway*, a dispute existed among the carrier's employees whether they were represented by a company union or by a union affiliated with the American Federation of Labor. The Mediation Board certified the A.F.L. union as the "true" Section 2, Ninth representative. The carrier continued to bargain with the company union. Upholding an injunction against this bargaining, the Supreme Court held:

> "The obligation imposed on the employer by . . . Ninth to treat with the true representative of the employees as designated by the Mediation Board . . . is exclusive. It imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other. . . ."

The duty "to treat with 'the true representative'" of employees and "with no other" must be read in the context of the facts in *Virginian Railway*. There the Mediation Board had already determined that one union was the representative of the only employees concerned. The company union properly represented nobody. Hence the carrier could not bargain with the company union without deviating from the representative status of the certified union.

Here the facts are very different. The Mediation Board has not certified which union is the true representative of apprentice locomotive engineers. As we discuss more fully below, it was quite correct in refusing to make such a certification. Thus, in bargaining with the Firemen over the

terms of the apprentice engineer program, the carriers would not have derogated from the Engineers' status as certified representative of locomotive engineers, unless in some way such bargaining violated the carriers' collective agreement with the Engineers. But if this latter were the case, the Engineers' proper remedy lay not in the courts or before the Mediation Board, but rather in a proceeding under Section 3 of the Act before the National Railroad Adjustment Board.[15] In short, no representative had been certified for apprentice engineers. In such a situation any union for whom future apprentices were "fairly claimable" as part of that union's craft or class could legitimately bargain with the carriers about the terms and conditions under which such future engineers would work.[16]

Consideration of the history of the relationship between the Firemen and the Engineers leads to the conclusion that the Firemen had a reasonable expectation that they might finally represent at least some future employees falling within the as yet largely empty category of "apprentice engineers."[17] Though legal title may point toward the Engi-

[15] 45 U.S.C. § 153 (1964 ed.). Section 3 of the Act gives the National Railroad Adjustment Board jurisdiction to decide "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" upon petition by either party. When such disputes involve a second union the N.R.A.B. has the duty to consider the claims of the second union. *Transportation Communications Employees Union v. Union Pacific R. Co.*, 385 U.S. 157 (1966).

[16] *Cf. Texas and Pacific Railway Co. v. Local Div. No. 1, 242 U.S.* 157, 37 S.Ct. 78 (1916).

The question of which proposals are bargainable is one which under the Railway Labor Act may be decided by the courts. By their very nature such questions cannot be settled by collective bargaining and the Act does not provide for their settlement by either the National Mediation Board or the National Railroad Adjustment Board.

[17] This is not to cast doubt on the Engineers' status as representative of the apprentices actually employed by the L & N. The point

> the railroads and their employees themselves. It is too late now to argue that employees can have no collective voice to influence railroads to act in a way that will preserve the interests of the employees as well as the interests of the railroad and the public at large."[19]

Here, even assuming that the Firemen will never represent any of the apprentice engineers, present firemen have a "job security" interest in the length and size of the apprenticeship program. Their union has long bargained with the carriers over the process of turning firemen into engineers.[20] In the past they have even bargained to restrict carriers' practice of bringing in outside engineers to fill vacant jobs.[21] Thus their historical expectation of promotion to the job of engineer is a "term or condition" of their employment which their union may legitimately bargain to protect.

Therefore, we conclude that the Firemen's Section 6 notice concerning engineer apprenticeship programs served on appellee carriers during 1965 was bargainable under the

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[19] 362 U.S. at 338.

[20] For example, the Firemen's collective agreement with the St. Louis Southwestern Railway Company contains the following provisions:

> "62.1. Firemen shall rank on the firemen's roster from the date of their first service as firemen when called for such service except as provided in Article 62.11 and when qualified shall be promoted to positions as engineers in accordance with the following rules:
>
> "62.2. Firemen shall be examined for promotion according to seniority on the firemen's roster and those passing the required examination shall be given certificates of qualification and when promoted, shall hold their same relative standing in the service to which promoted."

[21] While the railroads were under federal control during World War I, firemen complained that their promotional chances were being impaired by the carriers' practice of bringing outside engineers over the heads of their own firemen with many years' seniority. As a result the industry adopted the "Chicago Joint Agreement" which outlawed this practice. When the railroads returned to private control in

Railway Labor Act. The National Mediation Board's assumption of mediation over the notice was proper under Section 5 of the Act. The District Court's order relieving the carriers of their duty to bargain over the notice must be set aside.

III

The District Court also ordered the National Mediation Board to investigate the dispute and certify to the parties whether apprentices being trained to become locomotive engineers come within the craft or class of locomotive engineers [illegible] or within the craft or class of locomotive firemen [illegible] at either. The court's order was based upon Section 2 Ninth of the Railway Labor Act, which provides that the Board shall "investigate" and decide disputes "among a carrier's employees as to who are the representatives of such employees". The Board had deemed the Engineers' request that it settle the dispute under Section 2 Ninth

As the Supreme Court has noted, Section 2 Ninth was designed to "resolve a wide range of jurisdictional disputes between unions or between groups of employees". On the other hand, some inter-union disputes are best left to those voluntary processes whose use Congress has encouraged to protect these arteries of interstate commerce from industrial strife. And as the court has recognized, "the Board has no power under Section 2 Ninth to decide a jurisdictional dispute merely as such".

The language of Section 2 Ninth does not [illegible] the nature of the "interference" or "disagreement"

disputes which the section covers. The Board is to decide disputes "among a carrier's employees as to who are the representatives of such employees." The statute describes the manner in which the dispute is to be settled. The Board may use a secret ballot, or "utilize any other appropriate method" of determining the "choice of representatives by the employees without interference, influence, or coercion exercised by the carrier."[26]

The regulations promulgated by the Board under Section 2, Ninth, conform to the natural reading of the statutory language. To invoke the Board's Section 2, Ninth, powers, a union challenging another union's right to represent a class or craft must present authorization cards showing that employees within the class or craft support the invoking union.[27] Further regulations set out the number of authorization cards which must be presented before the Board will hold an election.[28] Thus the regulations, like the statute, contemplate that when within an existing group of employees some wish to be represented by one union and some by another, the Board is to decide which union is "the true representative."

The situation presented to the Board in this case deviated widely from the sort of dispute contemplated by Section 2, Ninth. The Engineers applied to the Board for a Section 2, Ninth, decision as to who represented the apprentice engineers recently hired by the L & N (the only carrier to have actually hired apprentices). It will be recalled that the L & N apprenticeship program was instituted pursuant to an agreement with the Engineers, which left the content of the program to management discretion. These apprentices were to be represented by the Engineers. The carriers thought so, the union thought so, and apparently the apprentices thought so. No authorization cards were brought to the

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[26] 45 U.S.C. § 152, Ninth.

[27] 29 C.F.R. § 1203.2 (1968).

[28] 29 C.F.R. § 1206.2 (1968).

Board showing a dispute *among* the apprentices over who represented them. Nor was this a mere technical failing, no one has claimed before the Board, before the District Court, or before us, that any such dispute could have been shown.

There was undoubtedly a dispute between the two unions which revolved generally around the apprenticeship program. For instance, the Firemen thought that the L & N should bargain over the Firemen's proposal, the Engineers and the L & N thought not. In that the unions represent their members, this was a dispute among employees over the carrier. The firemen employees thought they had a bargainable interest in the apprenticeship program, the engineer employees thought not. But no single employee was in dispute with another employee over who did or should represent a group to which they jointly belonged.

Thus the Board's decision that it did not have Section 2, Ninth, jurisdiction was firmly supported by the language of the statute and by the scheme erected to administer it. In addition, of course, the Board's construction of its own jurisdictional statute deserves substantial deference.[29] If more is needed, sound policies rooted in the Railway Labor Act supported the Board's decision.

When the Board makes a craft or class determination concerning a group of employees, it does so partly on the basis of the kind of work those employees are doing.[30] If their work looks more like the work traditionally done by firemen, that cuts in favor of certifying them as firemen; if it looks more like engineers' work, the Engineers' union is more likely to be certified as the representative.

Here, the Board could not yet know the nature of what work, if any, the apprentices would be doing. To that

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[29] *Udall v. Tallman*, 380 U.S. 1 (1965); *cf. N.L.R.B. v. National Security Ins.*, U.S. , 37 U.S.L. WEEK 4101, 4105 (January 27, 1969).

[30] *See Brotherhood of Railway & Steamship Clerks v. Association for Benefit of Non-Contract Employees*, supra Note 9, 380 U.S. at 662, 665.

extent, it was disabled from making a proper Section 2, Ninth, class or craft determination. True, apprentices were employed on the L & N. But that program had been worked out solely between the carrier and the Engineers. The Firemen had not yet been able to bargain about the nature of the program. The Board could not fairly make its determination on the basis of a program respecting which only one of the two competing unions had had its say. To have done so would have in effect accepted a *fait accompli* achieved only because the carrier had improperly refused to bargain with the Firemen.

It may be that the Firemen have sufficient bargaining power to win some concessions from the carriers concerning apprentice training. Perhaps a longer apprenticeship program can be won, a less formal program involving more on-the-job training. Perhaps the suggestion in the Firemen's original proposal that the program be regarded as a training program for enginemen generally (that is, firemen and engineers) might be implemented in part or in whole.[31] Any of these changes might alter the Board's ultimate Section 2, Ninth, determination as respects representation of apprentices. Finally, the unions might achieve some degree of harmony in tripartite bargaining and mediation with the railroads. And some joint-union apprenticeship plan, akin to that proposed in 1960, might obviate the need for any Section 2, Ninth, determination at all.

These policy considerations demonstrate why it would be premature for the Board to decide now who represents apprentice engineers. These policies, the literal language of the statute, and the Board's own reading of it, all lead toward the conclusion that the Board presently lacks juris-

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[31]The Firemen's § 6 notice included a definition of "apprentice" as "a person who is engaged in learning the craft of Locomotive Engineman." In fact there is no such recognized craft, as the District Court found, 284 F.Supp. at 346. The terms "engineman" or "engine service employee" refer to the joint class of firemen and engineers.

diction under Section 2, Ninth, to determine the representative of apprentice locomotive engineers.

Accordingly, the District Court's injunction ordering the Board to decide the dispute must be vacated. The District Court orders enforcing its basic decree, from which the Firemen have sought interim relief, must be vacated along with the decree itself.

Reversed.

BURGER, *Circuit Judge*, with whom *Circuit Judge* TAMM joins, *concurring:* I concur in the result reached and add these comments to clarify the basis upon which I rely.

The arguments advanced by the Carriers and the Engineers are very persuasive as to what kind of statute the public interest called for, as the instant case and others abundantly illustrate. Unfortunately, however, an inadequate statutory scheme leaves the problems posed by this litigation "falling between two stools." The absence of existing apprentices seems to preclude there being a "representational" dispute within the meaning of Section 2, Ninth. As for the two presently operating apprentice programs Section 2, Ninth once again appears unavailing since there is no dispute among those apprentices as to who their representative is. Finally, since none of the parties claim that the instant dispute arises under their respective collective bargaining agreements, it appears that the National Railroad Adjustment Board does not have jurisdiction. Thus, despite a clearly expressed broad Congressional intent that "(a)ll disputes . . . be considered with all expedition" 45 U.S.C. § 152, Second, the shippers—and the public, which ultimately bears the burdens of all such conflicts—must continue to pay a heavy cost for the futile controversy which has engaged the courts and numerous litigants for so long.

Added to this, we cannot be unmindful that for over thirty years the Mediation Board has construed the statute

as not vesting in it the powers which Appellees urge. The controversies which led to the creation of Board 282 and subsequent events might well cause some doubts in Congress as to the Board's construction of the statute, but this cannot encourage us, as admittedly is often done by judges, to read the statute—a euphemism for re-writing it—as we think Congress should have drafted it. That the course we are compelled to follow may well prolong this unhappy history of wasteful strife is a matter within the power and province of Congress.

The broad claims of the Firemen concerning the historical connection between their craft and the training of railroad engineers deserves some comment. The Firemen were indeed the source of most of those who became railroad engineers, but they were the "pupils," not the teachers; the Engineers trained and taught the Firemen so that they could qualify for engineer jobs when available. To what extent this gives the Firemen a "bargainable interest" in the apprenticeship training program of the Carriers is not clear, but we are not called upon now to define its scope.

Moreover, if anything is clear from the history which preceded Board 282 it is that due to gradual technological changes the traditional functions of the Firemen had become largely obsolete, but the carriers, shippers and the public were not relieved of the burden of unneeded employees. To remedy this problem Congress created Board 282; after lengthy hearings the Board permitted the carriers to extinguish up to ninety percent of the Firemen's jobs. Although the 282 Award has, by its terms, expired, this Court has recognized that its obvious legislative intent has not thereby lost its vitality.[1] The primary interest of the Firemen at this juncture is to ensure that their promotional rights are not impaired by having graduate apprentices supersede

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[1] *See* Brotherhood of L.F.E. v. Bangor & Aroostook R.R. Co., No. 20,472 (D.C. Cir., decided February 28, 1969); Brotherhood of Railroad Trainmen v. Akron & B.B. R.R. Co., 128 U.S. App. D.C. 59, 385 F.2d 581 *passim* (1967), *cert. denied*, 390 U.S. 923 (1968).

existing firemen in their quest to become engineers. History and logic, then, may well point toward confining the "bargainable interest" of the Firemen solely to the *effect* and not the internal structure of the apprentice programs; this is not to say that both of the contending Unions may not have some contribution to make within the framework of their experience.

Today's result places the carriers in the unhappy position of having to deal simultaneously with two rival unions whose bargaining demands will very likely conflict if a high order of union statesmanship is not forthcoming. Moreover, since both Unions have now been given the right to serve Section 6 notices, the disappointed Union will have the right to strike once the statutory proeedures are exhausted. The Carriers will be able neither to avoid nor to resolve a strike by agreeing with the striking union without the risk of violating its obligation not to depart unilaterally from its agreement with the other Union. Although I consider this to be a wholly unsatisfactory resolution I can find nothing in the statute which permits the Court to impose a different result.

Judgment of the Court of Appeals

[Filed March 14, 1969]

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,050 September Term, 1968.

Civil Action 2060-66

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Appellant,*

v.

NATIONAL MEDIATION BOARD, et al., *Appellees.*

No. 22,185

NATIONAL MEDIATION BOARD, *Appellant,*

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *Appellee.*

Appeals from the United States District Court for the District of Columbia.

Before: BURGER, WRIGHT and TAMM, *Circuit Judges.*

Judgment

These cases came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION THEREOF, It is ordered and adjudged by this Court that the judgment of the District Court dated April 26, 1968, appealed from herein is hereby reversed, and the District Court is hereby directed to vacate the aforesaid judgment.

Per Curiam

For the Court:

NATHAN J. PAULSON,

Clerk.

Dated: March 14, 1969.

Opinion by Circuit Judge Wright.

Separate concurring opinion by Circuit Judge Burger, with whom Circuit Judge Tamm joins.

Findings of Fact and Conclusions of Law of the District Court

[Filed April 26, 1968]

On the basis of the pleadings and affidavits on file, the Court hereby makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Each of the defendants Louisville & Nashville Railroad Company, Southern Pacific Company, Great Northern Railway Company, Illinois Central Railroad Company, Atlantic Coast Line Railroad Company, and St. Louis Southwestern Railway Company is a "carrier" as defined in Section 1 First of the Railway Labor Act (45 U.S.C. § 151 First).

2. The plaintiff Brotherhood of Locomotive Engineers (hereinafter called the "BLE"), and the defendant Brotherhood of Locomotive Firemen and Enginemen (hereinafter called the "BLF&E") are unincorporated labor organizations which represent certain employees of the carrier defendants and of various other carriers for purposes of the Railway Labor Act (45 U.S.C. §§ 151 et seq.).

3. The defendant National Mediation Board (hereinafter called the "NMB") is an agency of the federal government which has certain duties, powers, and functions under the Railway Labor Act (45 U.S.C. § 154).

4. In the railroad industry, the representation of employees by labor organizations is and for many years has been on the basis of crafts or classes of employees.

5. There are and for many years have been two crafts or classes of engine service employees, that is, employees whose basic duties are confined to service in the cabs of locomotives: locomotive engineers and locomotive firemen.

6. The BLE is and for many years has been the duly designated and authorized representative of the craft or class of locomotive engineers on each of the carrier defendants and on most of the other railroads in the United States. On each carrier where that is true, it is undisputed that under the Railway Labor Act the BLE is the exclusive representative of all of the carrier's employees within the craft or class of locomotive engineers and is the only organization authorized to serve upon the carrier under Section 6 of the Railway Labor Act (45 U.S.C. § 156) notices of proposals to change the rates of pay, rules, or working conditions applicable to the craft or class of locomotive engineers, to confer, negotiate, or bargain with the carrier about such proposals, and to enter into agreements with the carrier about the rates of pay, rules, and working conditions applicable to the craft or class of locomotive engineers.

7. The BLF&E is and for many years has been the duly designated and authorized representative of the craft or class of locomotive firemen on each of the carrier defendants and on most of the other railroads in the United States. On each carrier where that is true, it is undisputed that under the Railway Labor Act the BLF&E is the exclusive representative of all of the carrier's employees within the craft or class of locomotive firemen and is the only organization authorized to serve upon the carrier under Section 6 of the Railway Labor Act (45 U.S.C. § 156) notices of proposals to change the rates of pay, rules, or working conditions applicable to the craft or class of locomotive firemen, to confer, negotiate, or bargain with the carrier about such proposals, and to enter into agreements with the carrier about the rates of pay, rules, and working conditions applicable to the craft or class of locomotive firemen.

8. There is no existing separate craft or class of employees, for purposes of the Railway Labor Act, designated or known as "engine service employees" or "locomotive enginemen." The term "engine service employees" is commonly understood in the railroad industry to refer to both locomotive engineers and locomotive firemen.

9. Locomotive engineers generally are needed and used on all locomotives operated by a carrier. Prior to the effectuation of the Award by Arbitration Board No. 282, agreements between the carriers and the BLF&E generally required that a locomotive fireman be used on each locomotive operated by a carrier. That Award, which was issued on November 26, 1963, pursuant to Public Law 88-108 (77 Stat. 132), generally authorized the carriers to eliminate up to ninety percent of locomotive fireman positions on locomotives in freight and yard service.

10. For many years, the carriers' needs for additional locomotive engineers had been met primarily, although not exclusively, by the promotion of qualified locomotive firemen to the craft or class of locomotive engineers. When a

locomotive engineer is no longer needed as such, because of fluctuations in the carrier's business or other reasons, he may be demoted, according to his seniority, to the craft or class of locomotive firemen. The collective bargaining agreements between each carrier and the BLE and the collective bargaining agreements between that carrier and the BLF&E contain substantially identical provisions concerning the promotion of qualified locomotive firemen to locomotive engineers and the demotion of unneeded locomotive engineers to locomotive firemen. Those provisions were adopted by the Director General of Railroads in 1919, when the railroads were being operated by the Federal Government, and have been retained, with some modifications, ever since. They do not specify the training required before a locomotive fireman may be qualified for promotion to locomotive engineer or a locomotive engineer may be hired by a carrier.

11. A locomotive fireman who has been promoted to the craft or class of locomotive engineers thereafter is represented by the BLE (except on those few railroads on which the craft or class of locomotive engineers is represented by the BLF&E) for as long as he remains a member of that craft or class; he is no longer represented by the BLF&E; and the rates of pay, rules, and working conditions established by the carrier with the BLE, rather than the rates of pay, rules, and working conditions established by the carrier with the BLF&E, are applicable to such individual. When a locomotive engineer has been demoted to the craft or class of locomotive firemen, thereafter he is represented by the BLF&E (except on those few railroads on which locomotive firemen are represented by the BLE) for as long as he remains a member of that craft or class; he is no longer represented by the BLE; and the rates of pay, rules, and working conditions established by the carrier with the BLF&E, rather than the rates of pay, rules and working conditions established by the carrier with the BLE, are applicable to such individual.

12. Prior to the effectuation of the Award by Arbitration Board No. 282 (Finding of Fact 9, above), the needs of the carriers for additional locomotive engineers generally could be fully satisfied through the promotion of qualified locomotive firemen and the hiring of persons otherwise qualified to become locomotive engineers. There was no necessity for a program to train apprentices to become locomotive engineers, and none of the carriers had such a program. As the number of locomotive firemen employed by the carriers, and thus the number of locomotive firemen qualified for promotion to locomotive engineers, has been reduced following effectuation of the Award by Arbitration Board No. 282, the defendant Louisville & Nashville Railroad Company has found it necessary to provide an additional source for obtaining locomotive engineers. Other carrier defendants and other railroads foresee a similar need within the near future.

13. In order to meet its needs for locomotive engineers, the defendant Louisville & Nashville Railroad Company determined it to be necessary, in April 1966, to establish a program for the training of apprentices to become locomotive engineers. On April 28, 1966, that carrier and the BLE entered into an agreement establishing the rate of pay applicable to such apprentices. While the Louisville & Nashville continues to promote qualified and available locomotive firemen to positions as locomotive engineers, part of its need for additional locomotive engineers is now being met by hiring apprentices who have successfully completed the apprentice training program and qualified to become locomotive engineers. The BLE has been recognized by the Louisville & Nashville as the designated and authorized bargaining representative of the apprentices, and the BLF&E has not applied to the NMB for an investigation to determine whether someone other than the BLE should be certified as the designated and authorized representative of such apprentices.

14. The defendant Great Northern Railway Company and the BLE entered into an agreement concerning the future training of apprentices to become locomotive engineers on September 13, 1967. Apart from the Louisville & Nashville and the Great Northern, none of the carrier defendants has yet established a program for training apprentices to become locomotive engineers. In some instances, the establishment of such a program has been delayed by the dispute between the BLE and the BLF&E as to which organization is entitled to represent apprentices training to become locomotive engineers, but some of the carrier defendants and other railroads believe that the establishment of such an apprentice training program within the relatively near future will be essential in order to assure them of an adequate supply of qualified locomotive engineers.

15. On or about March 25, 1965, the BLF&E served upon the defendant Louisville & Nashville Railroad Company a notice, purportedly pursuant to Section 6 of the Railway Labor Act (45 U.S.C. § 156), which proposed the establishment of an apprentice training program. On or about April 28, 1965, the BLF&E served upon the defendant Southern Pacific Company a notice, purportedly pursuant to Section 6 of the Railway Labor Act, which proposed the establishment of an apprentice training program. On or about November 15, 1965, the BLF&E served upon each of the carrier defendants except the Louisville & Nashville Railroad Company and upon more than 100 other railroads throughout the United States a notice, purportedly pursuant to Section 6 of the Railway Labor Act; this notice consisted of three parts identified as "Notice No. 1," "Notice No. 2," and "Notice No. 3"; the part designated as "Notice No. 3" proposed the establishment of an apprentice training program. "Notice No. 3" and the notices served upon the Louisville & Nashville and the Southern Pacific, described above, are hereinafter called the "apprentice notices."

16. In its apprentice notices, the BLF&E proposed to require the carriers to establish a program for the training of apprentices who, upon successful completion of the program, would become qualified and receive seniority as locomotive engineers, and those notices otherwise relate to the training of apprentices to become locomotive engineers.

17. In correspondence with the carriers shortly after the BLF&E's apprentice notices had been served, the BLE claimed that those notices encroached upon its jurisdiction as the representative of the craft or class of locomotive engineers and that the carriers could not lawfully bargain or agree with the BLF&E upon the apprentice training program proposed in those notices. The BLE has since consistently maintained that position before the NMB and in this Court, as well as otherwise, and threatens to strike and engage in other self-help against any carrier that confers, negotiates, or otherwise agrees with the BLF&E upon the merits of its apprentice notices.

18. In correspondence with the carriers and the NMB and before this Court, the BLF&E has claimed and it now claims that its apprentice notices come within its jurisdiction as the representative of the craft or class of locomotive firemen and that the carrier defendants and the other carriers served with the said notices are required by the Railway Labor Act to confer, negotiate, and otherwise bargain with the BLF&E about the merits of the proposals made therein. There is substantial likelihood that the BLF&E, if not restrained by the court, will engage in strikes or other self-help against the carriers with respect to this proposals if the procedures of the Railway Labor Act are exhausted without an agreement being reached between the said carriers and the BLF&E.

19. Since the BLF&E's apprentice notices were served on the carriers, there has existed, and there now exists, a dispute between the BLF&E and the BLE as to whether

apprentices being trained to become locomotive engineers are a part of the craft or class of locomotive firemen.

20. A strike by either the BLE or the BLF&E against any of the carrier defendants would cause grave and irreparable injury to the carrier and would disrupt essential transportation services in interstate commerce.

21. The carrier defendants and the other carriers served with the BLF&E's apprentice notices have expressed their willingness to bargain with the duly designated and authorized representative of apprentices training to become locomotive engineers regarding any valid and bargainable proposal with respect to the rates of pay, rules, or working conditions applicable to such apprentices. The carriers have objected to the BLF&E's apprentice notices, however, on the ground that those notices are invalid and non-bargainable under the Railway Labor Act because they are not within the jurisdiction of the BLF&E as the representative of the craft or class of locomotive firemen. The carriers have contended that they are not required to bargain or agree with the BLF&E with respect to the BLF&E's apprentice notices unless and until it has been definitely determined that the BLF&E is the designated and authorized representative of apprentices training to become locomotive engineers. Consequently, the carriers have refused to bargain with the BLF&E upon the merits of the BLF&E's apprentice notices. At various times, the BLF&E has applied to the NMB for its mediation services with respect to the apprentice notices served upon the carrier defendants and some of the other carriers, but no mediation upon the merits of the notices has occurred. The BLF&E has requested the NMB to terminate its services with respect to such notices, but the NMB has not done so.

22. On or about June 6, 1966, the representative of the carrier defendants and the other carriers that had been served with the BLF&E apprentice notices informed the

NMB of the dispute between the BLF&E and the BLE arising out of the BLF&E's apprentice notices and requested mediatory services of the NMB in order that the carriers might "be properly and legally informed as to which of the two disputing organizations may legally bargain for and on behalf of apprentice locomotive engineers." On or about June 21, 1966, the NMB dismissed this application on the ground that the question as posed "involved a question of representation" and that "[s]uch issues are resolved under Section 2, Ninth, of the Railway Labor Act." On or about June 29, 1966, counsel for the carriers requested a hearing for the purpose of securing clarification of the grounds for dismissal. This request was denied by the NMB on June 22, 1966.

23. On or about June 25, 1966, the BLF&E filed a complaint against the defendant Louisville & Nashville Railroad Company in the United States District Court for the Western District of Kentucky (Civil Action No. 5402). In that complaint, the BLF&E sought to restrain the Louisville & Nashville from effectuating and implementing the agreement of April 28, 1966, between the Louisville & Nashville and the BLE (Finding of Fact 13, above). On or about July 5, 1966, the court dismissed that action after concluding that the "action involves a controversy between BLF&E and BLE . . . as to which of those organizations is the exclusive bargaining representative for and in behalf of the apprentice locomotive engineers employed by the L&N and this Court has no jurisdiction to determine that controversy, the determination of which is exclusively within the jurisdiction of the National Mediation Board." An appeal by the BLF&E is now pending in the United States Court of Appeals for the Sixth Circuit (No. 17,588).

24. On or about June 30, 1966, and July 5, 1966, the BLE informed the NMB of the BLF&E's challenge to its right to represent apprentice locomotive engineers employed by the Louisville & Nashville and requested the NMB's services pursuant to Section 2 Ninth of the Rail-

way Labor Act. On July 22, 1966, the NMB dismissed this application on the ground that its authority under Section 2 Ninth does not extend to a "jurisdictional dispute as such," and that "the dispute, if any exists, is not a representation dispute; but may involve an issue as to the right of the employees of one craft or class to do the work that is alleged to be that commonly done by employees of another craft or class. Procedures other than those outlined in Section 2, Ninth, of the Railway Labor Act are available to settle such disputes."

25. On or about July 22, 1966, the NMB, acting upon the mediation cases involving the BLF&E's apprentice notices served upon the defendants Louisville & Nashville Railroad Company and Southern Pacific Company, notified the BLF&E and the carriers' representative that, because of the denial of the carriers' request for a hearing with respect to the dismissal of the carriers' application dated June 6, 1966 (Finding of Fact 22, above), the BLF&E and the carriers "should now enter into discussion concerning the Section 6 notices served by the BLF&E. . . ." Accordingly, the NMB announced that mediation conferences with respect to the apprentice notices served by the BLF&E upon those two carriers would be held on August 4, 1966.

26. On July 27, 1966, the BLE, stating its contention that the BLF&E's apprentice notice as served on the defendant Southern Pacific Company infringed on the BLE's right to represent apprentice locomotive engineers, applied for the NMB's services under Section 2 Ninth of the Railway Labor Act to determine which organization does represent apprentice locomotive engineers on the Southern Pacific for purposes of the Railway Labor Act, in order that the BLE might know whether that carrier could properly and legally bargain with the BLF&E concerning the apprentice notice. On July 28, 1966, the BLE requested the NMB to reconsider its dismissal of the

BLE's Section 2 Ninth application with respect to the right to represent apprentice locomotive engineers on the Louisville & Nashville (Finding of Fact 24, above), and to advise the BLE as to the nature of the "[p]rocedures other than those outlined in Section 2 Ninth" which the NMB had stated, in dismissing that application, "are available" to settle the dispute between the BLE and the BLF&E (Finding of Fact 24, above). The NMB did not reply to either the July 27, 1966, request with respect to the situation on the Louisville & Nashville, except that the NMB notified the BLE, on or about August 1, 1966, that mediation conferences would be held as scheduled on August 4, 1966.

27. On August 4, 1966, representatives of the NMB met separately with representatives of the BLF&E and representatives of the carriers, but the merits of the BLF&E's apprentice notices were not discussed. No further mediation with respect to those notices has been scheduled.

CONCLUSIONS OF LAW

1. This action arises under the Railway Labor Act, 45 U.S.S. §§ 151 et seq., and all parties are subject to that Act. The court has jurisdiction of the parties and the subject matter. 28 U.S.C. §§ 1331, 1337, 1361, 2201, 2202.

2. This action involves an actual case or controversy which is justiciable by this court. *Railway Clerks* v. *Employees Ass'n.*, 380 U.S. 650 (1965); *Brotherhood of R.R. Trainmen* v. *Akron & B.B. R.R.*, 55 CCH Lab. Cas. ¶ 11,912 (D.C. Cir., May 12, 1967), petitions for cert. pending; *Pan American World Airways, Inc.* v. *Int'l Bhd. of Teamsters*, —— F. Supp. ——, 56 CCH Lab. Cas. ¶ 12,270, at 20,205 (S.D.N.Y. Nov. 9, 1967).

3. Under the Railway Labor Act, the duly designated and authorized representative of a craft or class of employees of a carrier is the exclusive representative of that craft or

class for purposes of bargaining or agreeing with the carrier about the rates of pay, rules, and working conditions applicable to that craft or class. Only the duly designated and authorized representative of a craft or class of employees of a carrier may serve the carrier with a notice, pursuant to Section 6 of the Act, of proposed changes in agreements affecting rates of pay, rules, or working conditions applicable to such craft or class of employees. If an organization serves a carrier with a Section 6 notice concerning the rates of pay, rules, or working conditions of employees who are not within the craft or class represented by the organization, that notice is invalid, and the carrier is not required to confer, participate in mediation, or otherwise bargain with the organization concerning that notice or the proposals made therein. The apprentice notices served by the BLF&E upon the carrier defendants and many other carriers are valid and bargainable under the Railway Labor Act, therefore, only if the BLF&E is the duly designated and authorized representative on such carriers of apprentices training to become locomotive engineers. 45 U.S.C. §§ 152 Second through Tenth, 156; *Virginian Ry.* v. *Federation,* 300 U.S. 515, 548-549 (1937); *Southern Pacific Co.* v. *Switchmen's Union,* 356 F.2d 332 (9th Cir. 1965); *Order of Railway Cond. & Brake.* v. *Switchmen's Union,* 269 F.2d 726 (5th Cir. 1959).

4. There is a *bona fide* dispute between the BLE and the BLF&E as to whether apprentices training to become locomotive engineers are within the jurisdiction of the BLF&E as the designated and authorized representative of the craft or class of locomotive firemen on the defendant carriers and many other carriers or within the jurisdiction of the BLE as the designated and authorized representative of the craft or class of locomotive engineers on such carriers. The carriers are not required under the Railway Labor Act to confer, participate in mediation, or otherwise bargain with the BLF&E over its apprentice notices

unless and until it has been determined, in the manner provided by the Railway Labor Act, that the BLF&E is the duly designated and authorized representative on such carriers of apprentices training to become locomotive engineers. Until such time as it has been so determined and the procedures of the Railway Labor Act otherwise have been exhausted with respect to such notices, the BLF&E may not strike or otherwise engage in self-help against the carriers with respect to such notices or the proposals made therein. 45 U.S.C. §§ 155-160; *Southern Pacific Co.* v. *Switchmen's Union*, 356 F.2d 332 (9th Cir. 1965); *Ruby* v. *American Airlines, Inc.*, 323 F.2d 248, 255 (2d Cir. 1963); *Flight Engineers' Inter. Ass'n.* v. *Eastern Air Lines, Inc.*, 311 F.2d 745 (2d Cir. 1963); *Pan American World Airways* v. *Int'l Bhd. of Teamsters*, —— F. Supp. ——. 56 CCH Lab. Cas. ¶ 12,270 at 20,206 (S.D.N.Y. Nov. 9, 1967); see *NLRB* v. *Downtown Bakery Corp.*, 330 F.2d 921, 928 (6th Cir. 1965); *Garment Workers* v. *NLRB*, 280 F.2d 616, 621-622 (D.C. Cir. 1960), *aff'd* 366 U.S. 731 (1961); *NLRB* v. *Hannaford Bros. Co.*, 261 F.2d 638, 640 (1st Cir. 1958).

5. The dispute between the BLE and the BLF&E referred to in paragraph 4 above is a dispute among employees as to who are the representatives of such employees, within the meaning and intendment of Section 2 Ninth of the Railway Labor Act (45 U.S.C. § 152 Ninth). *General Committee* v. *M.-K.-T. R. Co.*, 320 U.S. 323, 336 (1943); *Switchmen's Union* v. *NMB*, 320 U.S. 297, 302 (1943); *Howard* v. *St. Louis S.F. Ry.*, 361 F.2d 905, 909 (8th Cir. 1966); *Southern Pacific Co.* v. *Switchmen's Union*, 356 F.2d 332, 335 (9th Cir. 1965); *Brotherhood of Loc. F. & E.* v. *Louisville & N. R.R.*, Civil Action No. 5402 (W.D. Ky. 1966), *appeal pending* (6th Cir.); "Railway Labor Act Amendments," *Hearings before House Comm. on Interstate and Foreign Commerce on H.R. 7650*, 73rd Cong., 2d Sess., pp. 45, 57 (1934).

6. The applications by the BLE under Section 2 Ninth of the Railway Labor Act with respect to the representation of apprentices being trained to become locomotive engineers on the Louisville & Nashville Railroad Company and the Southern Pacific Company, respectively, were valid and sufficient invocations of the jurisdiction of the NMB under Section 2 Ninth of the Act. Upon receipt of those applications, it was the duty of the NMB to investigate the dispute between the BLE and the BLF&E and to certify to the parties whether such apprentices come within the craft or class of locomotive engineers represented by the BLE or within the craft or class of locomotive firemen represented by the BLF&E, if either. *Railway Clerks* v. *Employees' Ass'n.*, 380 U.S. 650 (1965). and the authorities cited in paragraph 5 above.

7. The jurisdiction of the NMB under Section 2 Ninth of the Railway Labor Act to determine the dispute between the BLE and the BLF&E referred to in paragraph 4 above is exclusive, and this Court does not have jurisdiction to determine that dispute. *Railway Clerks* v. *Employees Ass'n.*, 380 U.S. 650, 658-661 (1965); *Switchmen's Union* v. *NMB*, 320 U.S. 297 (1943); *General Committee* v. *M.-K.-T. R. Co.*, 320 U.S. 323, 336 (1943); *General Committee* v. *Southern Pacific Co.*, 320 U.S. 338 (1943).

8. In dismissing or failing to act upon the applications of the BLE under Section 2 Ninth of the Railway Labor Act on the ground that the applications were beyond the jurisdiction of the NMB under Section 2 Ninth, the NMB failed to perform its mandatory duty under that Section. This court has authority to declare the statutory duty of the NMB in this action and to compel the NMB to perform its duty under Section 2 Ninth of the Act with respect to the BLE's applications. *Railway Clerks* v. *Employees Ass'n.*, 380 U.S. 650, 661 (1965); *Air Line Dispatchers Ass'n.* v. *NMB*, 189 F.2d 685 (D.C. Cir. 1951).

9. There is no genuine issue as to any material fact, and the BLE and carrier defendants are entitled to judgment as a matter of law, as hereinbefore set forth. Fed. R. Civ. P. 56.

10. The motion of the BLF&E for summary judgment should be denied, and the motions of the BLE and the carrier defendants for summary judgment should be granted as provided in the judgment being entered herewith.

/s/ JOHN J. SIRICA
United States District Judge

April 26, 1968

Judgment of the District Court

[Filed April 26, 1968]

Motions for summary judgment and affidavits having been filed by each of the parties except the defendant National Mediation Board, memoranda having been filed by all the parties, counsel for all the parties having been heard, the Court having determined that the motion for summary judgment filed by the defendant Brotherhood of Locomotive Firemen and Enginemen should be denied and that the motions for summary judgment filed by the plaintiff and by the carrier defendants should be granted, the Court having made its findings of fact and conclusions of law which are being filed herewith, and due deliberation having been had, it is hereby

ORDERED, ADJUDGED AND DECREED:

1. That the defendant National Mediation Board has the power and duty, which it is hereby directed to exercise under Section 2 Ninth of the Railway Labor Act (45 U.S.C. §152 Ninth), to investigate the dispute between the plaintiff and the defendant Brotherhood of Locomotive Firemen

and Enginemen, pursuant to the applications heretofore filed by plaintiff with the National Mediation Board, and to certify to the parties whether apprentices being trained to become locomotive engineers come within the craft or class of locomotive engineers represented by the BLE or within the craft or class of locomotive firemen represented by the BLF&E, if either.

2. That the defendants Louisville & Nashville Railroad Company, Southern Pacific Company, Great Northern Railway Company, Illinois Central Railroad Company, Atlantic Coast Line Railroad Company, and St. Louis Southwestern Railway Company, respectively, are not required to confer, participate in mediation, or otherwise bargain with respect to the apprentice notices served upon them by the Brotherhood of Locomotive Firemen and Enginemen unless and until the National Mediation Board determines, pursuant to an investigation under Section 2 Ninth of the Railway Labor Act, that the Brotherhood of Locomotive Firemen and Enginemen is the duly designated and authorized representative of apprentices training to become locomotive engineers on such carrier defendant.

3. That the Brotherhood of Locomotive Firemen and Enginemen, each of its lodges, divisions, locals, officers, agents, and employees, and all persons acting in concert with them, are hereby enjoined from authorizing, calling, encouraging, permitting, or engaging in any strikes and from picketing the premises of any of the carrier defendants referred to in paragraph 2 above for the purposes of requiring any of the said carrier defendants to bargain or agree with the Brotherhood of Locomotive Firemen and Enginemen concerning the proposals made in its apprentice notices unless and until: (1) the National Mediation Board determines, pursuant to an investigation under Section 2 Ninth of the Railway Labor Act, that the Brotherhood of Locomotive Firemen and Enginemen is the duly designated and authorized representative of apprentices training to

become locomotive engineers on such carrier defendant, and (2) the Brotherhood of Locomotive Firemen and Enginemen otherwise exhausts the procedures of the Railway Labor Act with respect to its apprentice notices.

4. Plaintiff and the carrier defendants shall recover from the defendant Brotherhood of Locomotive Firemen and Enginemen their taxable costs.

/s/ JOHN J. SIRICA
United States District Judge

April 26, 1968

Letter-Opinion and Order of the National Mediation Board

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

July 22, 1966

Mr. P. S. Heath, Grand Chief Engineer
Brotherhood of Locomotive Engineers
1118 BLE Building
Cleveland, Ohio 44114

Dear Mr. Heath:

On July 1, 1966, the Brotherhood of Locomotive Engineers addressed a telegram to the Board requesting its services pursuant to Section 2, Ninth, of the Railway Labor Act in a dispute involving representation of Apprentice Locomotive Engineers employed by the Louisville and Nashville Railroad.

In the telegram it was pointed out that the Brotherhood of Locomotive Engineers, as the certified representative of the Locomotive Engineers, had entered into an agreement with the Louisville and Nashville Railroad on April 28, 1966, for Apprentice Locomotive Engineers as a part of the craft or class of Locomotive Engineers. It was further stated that the Brotherhood of Locomotive Firemen and Enginemen had raised the question as to the BLE's right to represent Apprentice Locomotive Engineers employed by the Louisville and Nashville Railroad before the United States District Court for the Western District of Kentucky (Civil Action No. 5402).

This telegram was acknowledged and copies transmitted to the Carrier and the BLF&E for comments. The telegram was supplemented by a letter from the BLE, dated July 5, 1966, copy of which was also furnished to the Carrier and the BLF&E. Subsequently, comments were received from both the carrier and the BLF&E.

Mr. Scholl, Director of Personnel, Louisville and Nashville Railroad, in a letter dated July 11, 1966, states:

> "In compliance with your request that we furnish you a statement of our position in that matter, we wish to advise that, in our opinion, the Brotherhood of Locomotive Engineers represents apprentice locomotive engineers on this railroad and we have accordingly entered into an agreement with that organization relative to such apprentices."

Mr. Gilbert, President of the Brotherhood of Locomotive Firemen and Enginemen, in his letter of July 13, 1966, states:

> "Accordingly, it is clear that what Mr. Heath is asking the Board to do is to extend a right which it now has to represent on the L&N the craft or class of locomotive engineers to embrace employees performing the Functions of firemen in violation of the representation rights of this organization and in violation of the rights of the employees to select their own collective bargaining representative."

In the present situation, it is clear that the Brotherhood of Locomotive Engineers has been certified by the National Mediation Board, Case No. R-3225, Certification issued December 31, 1957, as the representative of the craft or class of Locomotive Engineers, employees of the Louisville and Nashville Railroad Company. Neither the carrier nor the Brotherhood of Locomotive Firemen and Enginemen dispute this fact.

It is also clear that the carrier has recognized the Brotherhood of Locomotive Engineers as the representative of the Apprentice Locomotive Engineers, employees of the L&N Railroad and have entered into an agreement with that organization relative to such apprentices.

Careful scrutiny of the statements received from the Brotherhood of Locomotive Firemen and Enginemen fails to reveal a position that a representation dispute exists.

Section 2, Ninth, of the Railway Labor Act provides:

> "If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier."

Section 2, Ninth, of the Act quoted above authorizes this Board to investigate a dispute to determine the representative of the employees, but under this section of the law, the Board has no authority to decide a jurisdictional dispute as such.

Review of the contentions of all concerned indicates that the dispute, if any exists, is not a representation dispute; but may involve an issue as to the right of the employees of one craft or class to do the work that is alleged to be that commonly done by employees of another craft or class. Procedures other than those outlined in Section 2, Ninth, of the Railway Labor Act are available to settle such disputes.

The Board in executive session July 19, 1966, examined the complete file pertaining to the request received from the Brotherhood of Locomotive Engineers to investigate, pursuant to Section 2, Ninth, of the Railway Labor Act, a representation dispute among Apprentice Locomotive Engineers as part of the craft or class of Locomotive Engineers.

After full consideration of the request and the arguments of the parties in support of their contentions, the Board concludes and hereby finds that no dispute within the meaning of Section 2, Ninth, of the Act exists and that the application of the Brotherhood of Locomotive Engineers should be and is hereby dismissed.

By direction of the NATIONAL MEDIATION BOARD.

/s/ Thomas A. Tracy
Executive Secretary

Excerpts from the Railway Labor Act

Railway Labor Act (44 Stat. 577, as amended, 45 U.S.C. § 151 et seq.)

Definitions

Section 1. When used in this Act and for the purposes of this Act—

• • • • •

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) • • •

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

• • • • •

General Purposes

Section 2. The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

General Duties

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable

effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing

any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided,* That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this Act, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided,* (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further,* That nothing in this Act shall be con-

strued to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of the Act.

Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by

the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. The willful failure or refusal of any carrier, its officers, or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided,* That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the

performance by an individual employee of such labor or service, without his consent.

* * * * *

NATIONAL BOARD OF ADJUSTMENT; GRIEVANCES; INTERPRETATION AGREEMENTS

SECTION 3. First. There is hereby established, a Board to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

* * * * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

* * * * *

FUNCTIONS OF MEDIATION BOARD

SECTION 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in Section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under Section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

* * * * *

SECTION 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party,

or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by Section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

* * * * *

EMERGENCY BOARD

SECTION 10. If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this Act and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is hereby authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board and for thirty days after such board has made its report to the President,

no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

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SUPREME COURT, U. S.

Nos. 200, 206

FILED
AUG 28 1969
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In the Supreme Court of the United States

OCTOBER TERM, 1969

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL.,
PETITIONERS

v.

NATIONAL MEDIATION BOARD, ET AL.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
PETITIONER

v.

NATIONAL MEDIATION BOARD, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL MEDIATION BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. in No. 200, pp. 1-19) is reported at 410 F.2d 1025.

The findings of fact, conclusions of law, and judgment of the district court (Pet. App. in No. 200, pp. 21-37) are reported at 284 F. Supp. 344.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1969. The petitions for writs of certiorari were filed on June 5, 1969, and June 6, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Section 2, Ninth, of the Railway Labor Act requires the National Mediation Board to investigate disputes "among a carrier's employees as to who are the representatives of such employees * * *" and to certify the representatives of employees. The questions presented are:

1. Whether Section 2, Ninth, requires the Board to determine who will be the representative of future employees who may be hired under a program which has been proposed but not yet adopted.

2. Whether Section 2, Ninth, requires the Board to determine what craft or class certain employees belong in when there is no dispute as to who represents the employees.

3. Whether the carriers were justified in refusing to bargain over proposals made by the Brotherhood of Locomotive Firemen and Enginemen relating to promotion and training of engine service employees.

STATEMENT

This action was brought by the petitioner in No. 206, the Brotherhood of Locomotive Engineers (the "Engineers"), against the National Mediation Board, the Brotherhood of Locomotive Firemen and Enginemen (the "Firemen"), and six railroads.[1] The principal relief sought by the Engineers and carrier defendants, and granted by the district court, was an order compelling the National Mediation Board, acting under Section 2, Ninth, of the Railway Labor Act (45 U.S.C. 152, Ninth), to resolve a dispute between the Engineers and the Firemen concerning their respective rights to bargain with the carriers in the development and operation of training programs for locomotive engineers.

In August 1963, in order to prevent a national railroad strike, Congress enacted Public Law 88-108, 77 Stat. 132, which provided for a two-year period of compulsory arbitration of the protracted dispute over the reduction of the number of firemen serving on railroads.[2] The Arbitration Board convened pursuant to P.L. 88-108, known as Board 282, issued a ruling which permitted the nation's 200 carriers to eliminate up to 90 percent of the firemen's positions on freight trains, with procedures for the protection

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[1] The Louisville & Nashville, Southern Pacific, Great Northern, Illinois Central, Atlantic Coast Line, and St. Louis Southwestern. The carriers are nominal defendants, who support the position of the Engineers.

[2] The history of the dispute is set forth in *Brotherhood of R. Trainmen* v. *Akron & Barberton B. R. Co.*, 385 F. 2d 581, 588-592 (C.A.D.C.), certiorari denied, 390 U.S. 923.

of existing employees. Since locomotive engineers traditionally have been promoted from the ranks of firemen,[3] the elimination of approximately 18,000 firemen's jobs under the Award[4] has caused the industry to consider alternative methods of assuring a continued supply of trained engineers.

In 1965 the Firemen served notices on the carriers, under Section 6 of the Act,[5] proposing the establishment of a three-year apprenticeship program (J.A. 56, 60-61).[6] The term "Apprentice" was defined both as "a person who is engaged in learning the craft of locomotive Enginemen", and as "synonymous with the term 'firemen.'" (J.A. 56.) During the course of the proposed program, apprentices were to "perform all duties commonly referred to as

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[3] Report of the Presidential Railroad Commission (1962), p. 45: "Engineers have almost universally been promoted from the ranks of firemen who pass qualifying examinations."

[4] See *Akron & Barberton*, *supra*, n. 2, 385 F. 2d at 610 n. 1.

[5] 45 U.S.C. 156, Pet. App. No. 200, pp. 48-49.

[6] "J.A." refers to the Joint Appendix in the court of appeals. In 1960, the Engineers, Firemen, and other operating unions had jointly served notices on the carriers pursuant to Section 6 proposing the establishment of a four-year apprenticeship program for engine service employees, who were to be known as "locomotive helpers" for the first three years and as "apprentice engineers" for the fourth year (J.A. 140-141). This joint notice—which was consistent with a long-established bargaining pattern, in which the training, seniority, and promotion of engine service employees were covered by identical provisions in the carriers' collective agreements with both the Engineers and Firemen—was overtaken by the mounting controversy which led to the enactment of P.L. 88-108. See J.A. 137-152, 190-191, 237-244, 256.

Locomotive Firemen duties" (J.A. 69) and, upon satisfactory completion of the program, to receive a seniority date as locomotive engineer (J.A. 65).

The Engineers objected to the Firemen's proposals, claiming that they infringed upon its jurisdiction as representative of the craft of engineers. The Engineers offered its own proposals for a much shorter training program to be established by agreement between it and the carriers, claiming that a lengthy apprenticeship is unnecessary for training an engineer (J.A. 196).

Fearing a strike by the Engineers, the carriers then refused to bargain with the Firemen. Two of the carriers, the Louisville and Nashville and Great Northern, also unilaterally negotiated agreements with the Engineers. The only term of employment fixed by the L&N agreement (J.A. 25) is wages; all other terms are left solely to management discretion.

When the L&N and Southern Pacific railroads refused to negotiate with the Firemen over its notices, the Firemen invoked the mediation services of the National Mediation Board under Section 5, First, of the Act (45 U.S.C. 155, First). The Board docketed the case and scheduled mediation for August 4, 1966 (J.A. 121-122).

On July 1, 1966, the Engineers applied to the Board for a determination under Section 2, Ninth (45 U.S.C. 152, Ninth), of which union would represent new apprentices on the L&N. On July 22, 1966, after receiving the views of the carrier and both unions, the Board dismissed the Engineers' application on the ground that there had not been shown

to exist a dispute falling within the purview of Section 2, Ninth (J.A. 26-29). In response to a subsequent request of the carriers and Engineers that mediation be recessed or that the Board reconsider its dismissal of the Engineer's application, the Board stated the "Mediation sessions * * * will be held as scheduled" (J.A. 221-228).[7]

On August 4, 1966, the Engineers filed its complaint in the present case. As noted above, the district court granted the principal relief requested, compelling the Board to investigate the dispute under Section 2, Ninth, and to certify which union is the representative of apprentices training to be engineers on the L&N and Southern Pacific (Pet. App. No. 200, p. 34). The district court relieved the carriers of any duty "to confer, participate in mediation, or otherwise bargain with respect to the apprentice notices served upon them" by the Firemen, "unless and until the National Mediation Board determines, pursuant to an investigation under Section 2 Ninth of the Railway Labor Act, that the Brotherhood of Locomotive Firemen and Enginemen is the duly designated and authorized representative of apprentices training to become locomotive engineers on such carrier defendant" (Pet. App. No. 200, p. 36).

The court of appeals reversed, sustaining the position of the National Mediation Board that it lacked jurisdiction over the controversy under Section 2,

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[7] The August 4, 1966, sessions were held; however, the discussion apparently centered entirely upon the interunion dispute (J.A. 254). As the result of the present litigation, no further mediation sessions have taken place.

Ninth of the Act, and ruling that the carriers were required to bargain with the Firemen (Pet. App. No. 200, pp. 1-19).

ARGUMENT

1. The court below correctly held that the present dispute is not within the jurisdiction of the National Mediation Board under Section 2, Ninth, of the Railway Labor Act.

Section 2, Ninth, of the Railway Labor Act grants the National Mediation Board authority to resolve disputes "among a carrier's employees as to who are the representatives of such employees * * *." In the present case, however, there is no dispute even among the two unions and the carriers as to which union represents any existing employees. With respect to the L&N, the only carrier on which "apprentices" actually had been hired at the relevant times, the Firemen's Union does not contest the Engineers' representation of those employees.[8] More importantly, for the purpose of testing the Board's jurisdiction, there certainly is no dispute in this case "among a carrier's employees." As the Board has held for more than 30 years, with the approval of the District of Columbia Circuit, *Brotherhood of R. Trainmen* v. *National Mediation Board*, 135 F. 2d 780, 782-784 (C.A.D.C.), jurisdiction under Section 2, Ninth, must

[8] The legislative history of the Act strongly supports the Board's position that it is not required to make craft or class determinations unless there is a dispute concerning who represents actual, existing employees. See Hearings on H.R. 7650 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. (1934), p. 56.

be premised on a representation dispute among individual employees and does not reach all jurisdictional disputes between unions. This requirement that there be a dispute among actual employees is recognized in the Board's regulations requiring applicants invoking its jurisdiction under Section 2, Ninth, to submit authorization cards from a certain percentage of employees. See 29 C.F.R. 1203.2; 29 C.F.R. 1206.2-.5.

The relief which petitioners in effect sought from the Board was not the resolution of a dispute among existing employees as to who are their representatives within the meaning of Section 2, Ninth, but an advance determination of the craft or class which will include future employees who may be hired as "apprentices" under some program which may be adopted in the future; no such employees had been hired on five of the six petitioning carriers at the time of the district court's decision. Section 2, Ninth, does not impose such a duty on the Board. The two unions have proposed substantially differing programs for the training of engine service employees, see pp. 4-5, *supra*, and the statute leaves the settlement of substantive terms of employment to private parties without compulsory arbitration. The Board therefore could not properly undertake to make a craft or class determination prior to the establishment of the program.[9] As the court below stated (Pet. App. No.

[9] The carriers claim (Pet. No. 200, p. 22) that "the NMB has settled jurisdictional disputes by drawing craft lines in situations indistinguishable from the case at bar." But none of the Board rulings relied upon for that proposition involved

200, p. 15):

> When the Board makes a craft or class determination concerning a group of employees, it does so partly on the basis of the kind of work those employees are doing. If their work looks more like the work traditionally done by firemen, that cuts in favor of certifying them as firemen; if it looks more like engineers' work, the Engineers' union is more likely to be certified as the representative.
>
> Here, the Board could not yet know the nature of what work, if any, the apprentices would be doing. * * *

Although petitioners contend that the decision below puts the carriers in a "dilemma" as to which union they are required to bargain with, the carriers here are not merely neutral parties caught between two quarreling unions. They are instead interested in the substantive terms of employment, and quite naturally seek to deal with the union which offers the training program most acceptable to them. To the extent that the carriers' position is difficult, that difficulty does not result from a misinterpreta-

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a situation like the present one, where the Board is asked either to determine 1) the craft into which non-existent future employees will fall, or 2) into which craft employees fall, when *no one* challenges an existing representative of those employees (here the L & N apprentices). The carriers' reliance (Pet. 19) on *Northwest Airlines, Inc.*, 2 NMB 19, 23 is misplaced. There the Board held that a carrier could not prevent employees from gaining an initial certification for their chosen representative by claiming that they were not in dispute among themselves. The result was plainly dictated by Section 2, Fourth, of the Act (45 U.S.C. 152, Fourth), which is of no assistance to the carriers here.

tion of the Act by the court below or the Board, but from the long history of involvement of two separate unions in the training, seniority and promotion of engine service employees. Moreover, it is a difficulty which is not incapable of resolution through the bargaining and mediation procedures which Congress evidently contemplated; as noted above (note 6, *supra*), at one time the two unions jointly proposed a mutually agreeable apprentice program.

The consequence of petitioners' position, on the other hand, would be that either firemen or engineers would be deprived of a voice in a matter which has a substantial effect on their livelihood. As the court below pointed out (Pet. App. No. 200, p. 11), the Firemen's proposals "can certainly be seen as economic protection for firemen not yet on the engineer seniority list. It would delay the infusion of new engineer recruits into those lists for three years, thus allowing present firemen a first crack at available engineer jobs." To deny the representatives of firemen an opportunity to try to negotiate a program for their training and promotion is entirely inconsistent with the purposes of the Railway Labor Act, and could place firemen in a "dilemma" in which they lose promotional opportunities without a chance at collective bargaining.

2. There is no conflict of decisions.

Contrary to petitioners' contentions, the decision below is not in conflict with any other appellate ruling. In none of the cases relied on by petitioners was the National Mediation Board a party; the cases con-

sequently could not have held that the Board was required to resolve the interunion disputes there involved. For example, *Brotherhood of Locomotive Fire & E.* v. *Louisville & N. R. Co.*, 400 F. 2d 572 (C.A. 6), certiorari denied, 393 U.S. 1050, held merely that the court could not make a craft determination, and hence could not enjoin the carriers' agreement with the engineers on the theory that it invaded the Firemen's jurisdiction. That ruling but follows the holding of this Court in *General Committee* v. *M.-K.-T. R. Co.*, 320 U.S. 323.

Southern Pacific Co. v. *Switchmen's Union of North America*, 356 F. 2d 332 (C.A. 9), is similarly distinguishable. There the court held that a carrier could refuse to bargain with a union over a proposal which would involve an area from which the union had been excluded by its own agreement, and that only the Board could change the craft lines. The Ninth Circuit did not delimit the circumstances in which the Board might be required to make a craft or class determination—the main issue here—but merely held that only the Board could take such action. It does not follow that because an interunion controversy may not be adjudicated by the courts, it is one which the Board is required to settle under Section 2, Ninth. Indeed, in *General Committee*, *supra*, this Court, while stating that Section 2, Ninth, was designed "to resolve a wide range of jurisdictional disputes," also recognized that some interunion disputes have been "left to those voluntary processes whose use Congress had long encouraged" and that there may be "many areas in this field where neither

the administrative nor the judicial function can be utilized;" this "is only to be expected where Congress still places such great reliance on the voluntary process of conciliation, mediation and arbitration." 320 U.S. at 336-337.

3. The court below correctly held that the carriers were required to bargain over the Firemen's proposals.

The premise of petitioners' position, in essence, is that a carrier can never be required to bargain with two unions over similar subject matter, notwithstanding past bargaining practices and the unmistakable interest of the unions and their members. The Board, on the basis of its lengthy experience with bargaining practices in this industry, rejected that view and advised the carriers that the proposals of both the Engineers and Firemen appeared to be proper (J.A. 100). Promotion, seniority, and training of engine service employees have long been the subject of bargaining with *both* unions—often resulting in identical contract provisions (J.A. 137-152, 190-191, 237-244, 256). In 1960, the unions jointly proposed an apprenticeship program, without objection that the joint proposal was inappropriate or that the firemen should be removed from the negotiations. Yet the district court's ruling which petitioners seek to reinstate would require the Board to eliminate the possibility of a settlement along the lines which both unions originally proposed.

It hardly can be contended, moreover, that the firemen lack a sufficient interest in the subject matter to require the carriers to bargain with them. Even under the Engineers' program, the apprentices obtain

seniority as firemen, and as railroad officials admitted, some are actually working as firemen upon completion of the program (J.A. 135, 137, 306, 321).[10]

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[10] The carrier's reliance (Pet. No. 200, 27-28) upon two decisions of the Court of Appeals for the Second Circuit involving a dispute over the reduction of the number of crew members in the cockpit of jet airplanes from four to three is misplaced. Prior to such reduction, there had been three pilots and a flight engineer, represented by different unions (the pilots association and the flight engineers); the basic dispute was whether the third man would be a pilot or a flight engineer, and which union would represent him.

Neither of those cases involved the question here presented of whether a carrier may be required to bargain with two unions. *Ruby* v. *American Airlines, Inc.*, 323 F. 2d 248, certiorari denied, 376 U.S. 913, involved a dispute among the pilots as to who was their representative; the court held that it was for the Board to make that decision, and it therefore could not enjoin the carrier from dealing with a new representative of pilots whom "the overwhelming majority of pilots have authorized * * * to act as their bargaining representative," although the Board had not certified it (323 F. 2d at 253). *Flight Engineers' Inter. Ass'n* v. *Eastern Air Lines, Inc.*, 311 F. 2d 745 (C.A. 2), certiorari denied, 373 U.S. 924, involved events after negotiations between the carrier and both unions had run the full course of the statutory bargaining process (see 311 F. 2d at 746). After the carrier had bargained in good faith with the flight engineers and the latter had called a strike, the carrier used self-help as the Act permits (*Railway Clerks* v. *Florida E.C.R. Co.*, 384 U.S. 238), replaced strikers and established terms of employment that were satisfactory to the other union. See *Flight Engineers Int. Ass'n, Eal Chap.* v. *Eastern Air Lines, Inc.*, 359 F. 2d 303, 308-309 (C.A. 2).

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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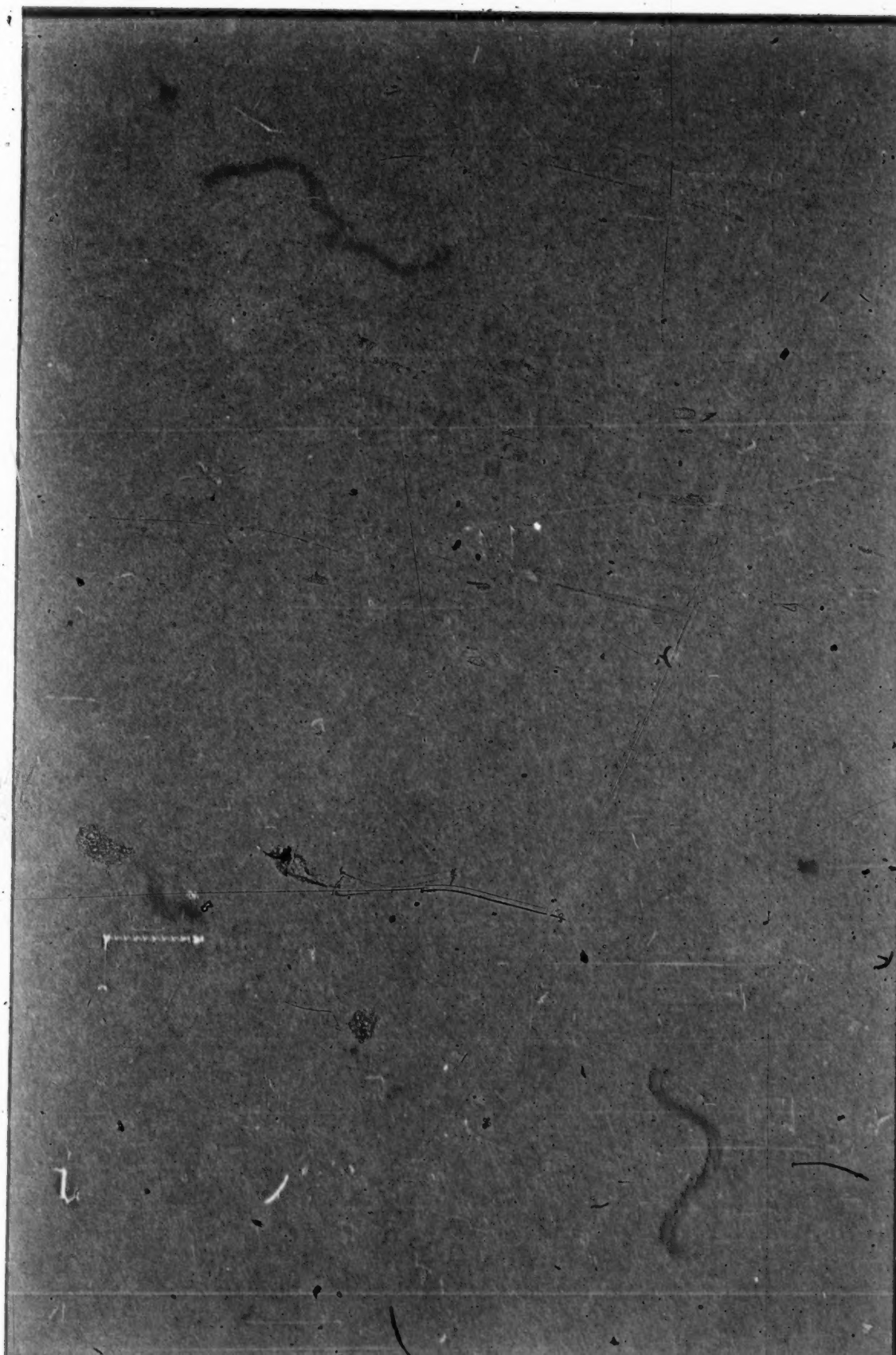

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 200

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL., *Petitioners,*

v.

NATIONAL MEDIATION BOARD, ET AL., *Respondents.*

PETITIONERS' REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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We believe that we have demonstrated in the petition that the court below has decided important issues of federal law concerning the interpretation and application of the Railway Labor Act in a manner that conflicts with prior decisions by this Court and other courts of appeals and with the purposes of that statute as disclosed by its language and legislative history. We are filing this Reply primarily to bring to the Court's attention a decision by another court of appeals, rendered after our petition was filed, which also construed the Railway Labor Act in a manner which we believe to be inconsistent with the decision by the court below.

We refer to the decision by the Fifth Circuit in *Brotherhood of Locomotive Firemen and Enginemen, et al.* v. *Seaboard Coast Line Railroad Company, et al.*, 71 LRRM 2522, 60 Labor Cases ¶10,138 (June 4, 1969), petition for cer-

tiorari pending, No. 585. Since that case has not yet been officially reported, the opinion of the Fifth Circuit, as reported in 71 LRRM 2522, is set forth in the Appendix hereto.

That case also involved a jurisdictional dispute between the Firemen's Union and the Engineers' Union. Prior to the merger of the Atlantic Coast Line Railroad Company ("ACL") and the Seaboard Air Line Railroad Company ("SAL") into the Seaboard Coast Line Railroad Company ("SCL"), the ACL had tripartite agreements entered into with both unions jointly concerning certain matters, while the SAL had made separate agreements with each union concerning those matters. The problem arose in connection with negotiating new agreements applying throughout the merged railroad—the SCL. After tripartite negotiations between the SCL and both unions were unsuccessful, the SCL made an agreement with the Engineers' Union alone. The Engineers' Union sued in the Middle District of Florida to enforce that agreement and the Firemen's Union sued in the Southern District of Florida to enjoin enforcement of the agreement. The Firemen contended, in essence, that the SCL was required to negotiate and agree with both unions jointly, and thus could not validly enter into an agreement with the Engineers alone.[1]

In affirming the dismissal of the Firemen's complaint by the Southern District of Florida, the Fifth Circuit stated (App., at 15-17), among other things, that:

"While it well may be that the firemen are entitled

[1] The Firemen's Union so contended despite the fact that it had previously agreed with the SCL, as had the Engineers and other unions representing employees of that carrier, "for the consolidation of seniority rosters according to craft through negotiations covering all employees of the merged company in each craft" (App., at 10, 16). In addition, as an alternative ground for its decision, the Fifth Circuit held that an adverse determination by the Middle District of Florida with respect to the same contention was *res judicata*. See App., at 14, 17.

to negotiate regarding subjects of the Engineers-Seaboard agreement, the issue is not one for judicial consideration. The determination as to which labor organization may treat with a railroad regarding a particular issue because of 'an asserting overlapping of the interests of two crafts,' General Committee of Adjustment v. Missouri-Kansas-Texas R.R., [320 U.S. 323,] at 334, is a representational dispute within the exclusive jurisdiction of the National Mediation Board, whether the dispute is between two unions, *id.*, or within one union, Division 14, Order of R.R. Telegraphers v. Leighty, [298 F.2d 17, 4th Cir., 1962], or following a merger, *id.;* Brotherhood of Ry. & Steamship Clerks v. United Air Lines, Inc., 6 Cir. 1963, 325 F.2d 576 . . . .

* * * * *

"This Court cannot say that simply because portions of the subject matter of the Engineers-Seaboard agreement formerly were the subject matter of tripartite agreements they necessarily must remain the subject of tripartite negotiations following the merger. We can perceive no distinction between the jurisdiction of a district court to resolve a dispute over whether a particular subject matter is within the representational jurisdiction of one labor organization rather than another, and the jurisdiction of a district court to resolve a dispute over whether a particular subject matter is within the concurrent representational jurisdiction of two labor organizations. A district court has jurisdiction to resolve neither dispute, the exclusive forum being the National Mediation Board. Underlying the issue of whether the provisions of the Engineers-Seaboard agreement should be in a two-

> party or a three-party agreement, having been in bipartite agreements on one constituent railroad and tripartite agreements on the other prior to the merger, is the necessity of determining whether the provisions are within the jurisdiction of one union or the other or both, for the provisions are not beyond dispute within the jurisdiction of one bargaining representative or the other. Only the National Mediation Board has jurisdiction to resolve this underlying issue . . . ."

There was no dispute in the Fifth Circuit case about the fact that the Engineers' Union represented the craft of locomotive engineers and the Firemen's Union represented the craft of locomotive firemen, on the SCL after the merger as on the ACL and the SAL prior to the merger. The dispute, rather, concerned the drawing of craft lines so as to determine "the jurisdiction of one union or the other or both" to negotiate agreements as to matters in which both crafts had an interest. The view of the Fifth Circuit that such a dispute is within the exclusive jurisdiction of the National Mediation Board to decide under Section 2 Ninth of the Act cannot be reconciled, we submit, with the decision by the court below in this case.

The Solicitor General (Brief, at 10-12) attempts to distinguish the decisions cited in the petition as being in conflict with the decision below in this case on the ground that the National Mediation Board was not a party to those cases and, hence, that those cases could not have held that the Board has jurisdiction under Section 2 Ninth. The Board also was not a party to the case in the Fifth Circuit discussed above. We think it obvious that the parties need not be identical in order for a conflict of decisions to arise. Whether or not the Fifth Circuit in the case discussed above or the Sixth Circuit in the case involving the identi-

cal dispute between the two unions that is involved here (see Petition, at 11-13), for example, were required to pass upon the jurisdiction of the Mediation Board,[2] the fact remains that they did consider that issue and conclude that the Board had jurisdiction. Moreover, those courts undoubtedly held that they did not have jurisdiction to decide inter-union disputes of the kind involved here and refused to decide whether one or the other or both unions had a right to negotiate or agree with the carriers. In this case, on the other hand, the court below held that both unions can require the carriers to negotiate (and thus to face a strike if they do not agree) about apprentice engineer training programs. In effect, therefore, the court below exercised jurisdiction which the courts do not have if the holdings of the Fifth and Sixth Circuits, among others, are correct.

One additional point perhaps should be emphasized as it may have been obscured by the briefs in opposition. The proposals for an apprentice engineer training program served by the Firemen's Union (JA 55-69) are *not* compatible with continuation of the present training programs established by the L&N and the Great Northern in agreement with the Engineers' Union or with representation of apprentice engineers on any of the petitioners by the Engineers' Union. Under the proposals made by the Firemen's Union (JA 65): "All engine service employees hired

[2] In *Railroad Trainmen* v. *Howard*, 343 U.S. 768, 774 (1952), this Court stated that parties may "look to a judicial remedy to prevent the sacrifice or obliteration of their rights under the Act" when "no adequate administrative remedy can be afforded by the National Railroad Adjustment Board or Mediation Board," and held that the courts had jurisdiction to prevent discrimination in violation of the Railway Labor Act upon the basis of a conclusion that neither Board had such jurisdiction. The Fifth and Sixth Circuits utilized the same approach, but held that the courts did not have jurisdiction upon the basis of their conclusion that the Mediation Board did have jurisdiction of the inter-union disputes involved in those cases.

subsequent to agreement implementing this apprenticeship program will be required to complete the training set forth herein, except as provided in D-2 [allowing credit in some circumstances for previous experience]." In short, *all* persons hired as engineers would have to train as apprentice engineers under a program established by agreement with the Firemen's Union and the apprentices would be paid wages provided in that agreement. Moreover, the Engineers' Union would be excluded from having any voice in the training program thus established even though the apprentices would "be given classroom instruction on all phases of engine service work" (JA 63), would "take assigned duties in all classifications of engine service work" (JA 69), would "be under the supervision of a competent engineer and/or fireman or supervisor at all times" (JA 63), and upon completion of the training would "receive a seniority date as locomotive engineer" (JA 65).

Thus, petitioners could not agree with the proposals made by the Firemen's Union without terminating the existing apprentice engineer training programs established by agreement with the Engineers' Union and excluding the Engineers' Union from representing any apprentices or from having any voice in the apprentice training programs. The Engineers' Union cannot be expected to countenance any such result, of course, and has made clear that it will not do so. While petitioners are willing to deal with either union in regard to the training of apprentice engineers if that union is properly found to be the representative of the apprentices, they should not be caught in the middle of such a jurisdictional dispute and we believe, unlike the court below, that the Railway Labor Act has provided a remedy under Section 2 Ninth of the Act.

For the reasons stated in the petition and above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Before THORNBERRY and DYER, Circuit Judges, and KEADY, District Judge.

DYER, Circuit Judge:—The Brotherhood of Locomotive Firemen and Enginemen [Firemen] and the Brotherhood of Locomotive Engineers [Engineers] had a history of tripartite collective bargaining negotiations and agreements with the Atlantic Coast Line Railroad Company [ACL]. The ACL later merged with the Seaboard Air Line Railroad Company [SAL], which had no such history of tripartite agreements, to form the Seaboard Coast Line Railroad Company [Seaboard]. In anticipation of the merger, both unions separately entered into employee protective agreements, providing for the merger and consolidation of collective bargaining agreements existing on the constituent railroads through negotiations covering all employees of the merged company in each craft. These companion appeals present the question of whether following the merger, tripartite negotiations by the Firemen, the Engineers and Seaboard were required. We hold that the Engineers and Seaboard could bilaterally negotiate an agreement relating to the consolidation of seniority rosters for engineer employees and affirm.

Prior to the merger, both the Firemen and the Engineers had collective bargaining agreements [Schedule Agreements] with ACL regulating wages, rules and working conditions for their respective crafts. Portions of the Engineers' Schedule Agreement were tripartite in nature, with the Firemen having participated in negotiations and agreed to the terms.[1] Changes in these provisions required thirty days' notice to each of the other parties with further handling in conformity with the procedures of the Railway

[1] The provisions related to the method of applying the mileage regulation of an engineer who during a given month worked both as an engineer and as a fireman, the penalty to be imposed when engineers or firemen failed to register the correct mileage, the method of calling demoted engineers for service when the engineers' extra list became exhausted and penalties to be imposed upon an employee who is out of place for call for service as an extra engineer, and the method to be used in returning engineers to the rank of fireman.

Labor Act. 45 U.S.C.A. § 151 *et seq.* Incorporated into the Engineers' Schedule Agreement with ACL was a mediation agreement between the unions and the ACL from which no party could withdraw without the consent of the other two.[2]

Both unions had complementing collective bargaining agreements with SAL, although these agreements were not tripartite. On the SAL the Engineers had separate yard and road seniority rosters, with the Firemen having a like distinction in their rosters.

The merger of ACL and SAL into Seaboard wended its way through the Interstate Commerce Commission and the Courts over a period of seven years.[3] In approving the merger in 1963, the ICC prescribed, as required by 49 U.S.C.A. § 5(2) (f),[4] minimal employee protective condi-

[2] The subject of the agreement, Mediation Agreement A-1607, was the maximum and minimum mileage to be accredited to the engineers' extra board.

[3] On May 19, 1960, the two railroads applied for merger with the Interstate Commerce Commission, and on December 13, 1963, the ICC approved the merger. 320 I.C.C. 122. A three-judge district court set aside the order approving the merger, Florida East Coast Ry. v. United States, M.D. Fla. 1965, 242 F. Supp. 14, but the Supreme Court reversed and remanded the case to the district court, Seaboard Air Line R.R. v. United States, 1965, 382 U.S. 154, which thereafter approved the merger, Florida East Coast Ry. v. United States, M.D. Fla. 1966, 259 F. Supp. 993, aff'd, 1967, 386 U.S. 544, which became effective July 1, 1967.

[4] Section 5(2)(c), of the Interstate Commerce Act, 49 U.S.C.A. § 5(2)(c) requires the ICC in passing upon applications for mergers to give weight to various considerations, among which is "the interest of the carrier employees affected." Section 5(2)(f) of the Act states that:

"(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining

tions similar to those imposed in other mergers. The Firemen, Engineers, ACL and SAL, however, entered into separate employee protective agreements, authorized by section 5(2) (f), which provided greater employee protections than those imposed by the ICC. On November 3, 1966, the Firemen, represented along with seventeen other unions by the Railway Labor Executives' Association, entered into an Agreement for Protection of Employees in Event of Merger of SAL and ACL [Firemen's Protective Agreement], which had been negotiated with representatives of both SAL and ACL. One week later, the Engineers separately entered into a nearly identical protective agreement [Engineers' Protective Agreement] with the two railroads.

The purpose of the two protective agreements was "to prescribe the procedures by which existing agreements between the parties shall be modified and consolidated to conform with the changes in services, facilities and operations involved in such merger." In nearly identical terms the protective agreements provided for the consolidation of seniority rosters according to craft through negotiations covering all employees of the merged company in each craft. The Firemen's Protective Agreement provided that the existing ACL and SAL

> agreements will be merged into new agreements through negotiations covering all employees of the Merged Company in each craft with consolidation of seniority rosters and seniority districts for each class and craft of employees.

The Engineers' Protective Agreement provided that

> such agreements will be merged into a new agreement through negotiations covering all employees of the Merged Company in each craft with consolidation of seniority rosters and seniority districts for engineers.

Both protective agreements constituted separate contracts with the labor organization and railroads signatory to them. In addition to requiring negotiations and consolidation of seniority rosters and districts, the protective agreements required Seaboard to "take over and assume

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to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

all contracts, schedules and agreements'' between the constituent railroads and the labor organizations.

The negotiations relating to fireman and engineer employees did not fare well, due to the close relationship of the two crafts. There is a high degree of intercraft mobility between firemen and engineers, with some individuals working as a fireman one day, an engineer the next, and a fireman again on the following day. Typically an individual holds seniority both as a fireman and as an engineer. The close relationship has stimulated frequent disputes over the years regarding the rules governing movement between the crafts such as rules governing the demotion of engineers, the return of demoted engineers to their work, the promotion of firemen to engineer, maximum mileage regulations and the like. Eventually these disputes have been resolved, as on the ACL through tripartite agreements or on the SAL through separate complementing agreements. The merger required their resolution again, since there were points of conflict in agreements both within one craft and between the two crafts on the two railroads. One subject of conflict was the consolidation of seniority districts and rosters, since on the SAL there was separate yard and road seniority for both firemen and engineers while on the ACL there was no such distinction.

Initially, Seaboard, the Firemen and the Engineers commenced three-way discussions in an attempt to arrive at mutually acceptable agreements for each craft. These proved unsuccessful, whereupon the Engineers and Seaboard commenced bilateral negotiations and eventually reached agreement. The Engineers and Seaboard agreed upon a new Schedule Agreement, redefining the rules, rates of pay and working conditions of engineers, and an Implementing Agreement, providing for the consolidation of seniority districts and seniority rosters. The Implementing Agreement provided for the consolidation of thirty-one seniority districts into six, with one seniority roster for each district.

The Engineers-Seaboard Schedule Agreement and Implementing Agreement were to go into effect January 16, 1968, but because of threatened litigation by the Firemen,

implementation was delayed until January 23, 1968.[5] After the week of delay had passed, Seaboard still refused to implement its agreement with the Engineers, so on January 29, 1968, the Engineers brought suit in the United States District Court for the Middle District of Florida to compel Seaboard to place the agreement into effect. On the following day, January 30th, the District Court entered a preliminary injunction requiring Seaboard to implement the agreement.

On the same day that the preliminary injunction was entered, January 30th, the Firemen, who were unaware of the Engineers' suit in the Middle District of Florida, brought suit in the United States District Court for the Southern District of Florida seeking to enjoin the implementation of the Engineers-Seaboard agreement. Upon learning of the Engineers' suit, on February 1, 1968, the Firemen moved to intervene in the Engineers' suit against Seaboard in the Middle District. A hearing on the motion was held the next day, and on February 1, 1968, the District Court denied the motion for intervention, holding that the motion presented a jurisdictional dispute between the Firemen and the Engineers which the National Mediation Board, not a district court, has exclusive jurisdiction to resolve.

Thereafter in the Southern District, the Engineers and Seaboard moved to dismiss the Firemen's complaint for failure to state a claim upon which relief could be granted, lack of jurisdiction over the subject matter, and res judicata because of the Middle District's order denying intervention. A hearing on the motion to dismiss was held on February 8th, and on February 12th the District Court, without stating its reasons, granted the motion to dismiss with leave to amend. One month later the Firemen filed notice of appeal from the order dismissing their complaint; then on March 19, 1968, they filed an Election to Stand on Original Complaint and Alternative Motion for Further

[5] At the same time, certain individuals commenced litigation in Georgia and South Carolina state courts to prevent the agreements from going into effect. The *ex parte* restraining orders in those cases were eventually dissolved.

Hearing or Entry of Final Judgment. The District Court obliged their last request by entering an order dismissing their complaint with prejudice, from which the Firemen on April 9th filed a second notice of appeal.

Preliminarily we dispose of the motion of the appellees to dismiss the appeal from the Southern District's case, No. 26,044. The appellees urge that the appeal should be dismissed as taken from a non-appealable order under the rule established in Bush v. United Benefit Fire Ins. Co., 5 Cir. 1963, 311 F.2d 893. The appellees construe Bush as holding that the District Court lacked jurisdiction to enter its second order of final judgment, from which notice of appeal also was filed, because of the pendency of appeal from the first non-appealable order. This construction is drawn by the appellees from the citation in Bush of Merritt-Chapman & Scott Corp. v. City of Seattle, 9 Cir. 1960, 281 F.2d 896, which the Ninth Circuit subsequently overruled in Ruby v. Secretary of United States Navy, 9 Cir. 1966, 365 F.2d 385. Reliance on Bush is misplaced, however, as it was merely held there that a certificate under Rule 54 (b), Fed. R. Civ. P., could not make an interlocutory order final for the purpose of permitting an appeal. "[A] certificate of the trial judge under that rule cannot have the effect of conferring jurisdiction where none is given by statute or of withdrawing jurisdiction where the statute confers it." King v. California Co., 5 Cir. 1955, 224 F.2d 193, 197, also cited in Bush, *supra* at 894 n. 1. In the instant case the appeal is before this Court on two notices of appeal, the first of which was premature and the second of which was proper. In such a circumstance we may simply strike the first notice and consider the appeal on the basis of the second. Cf. United States v. Crescent Amusement Co., 1944, 323 U.S. 173, 177-78.

The appeal from the Southern District in large part depends upon the correctness of the Middle District's decision. The Firemen's Southern District complaint seeking an injunction against enforcement of the Engineers-Seaboard agreement was dismissed without expressing the reason upon a motion stating three related grounds for dismissal, i.e., failure to state a claim upon which relief

could be granted, lack of jurisdiction over the subject matter, and res judicata; each of which has a measure of validity.

The Firemen and the Engineers are the certified bargaining agents for their respective crafts. If the Engineers-Seaboard agreement related solely to engineers, the principle of exclusive representation would indicate that the Firemen could state no claim upon which relief against its enforcement could be granted. Since the crafts of engineer and fireman are interrelated, however, a more accurate statement of why relief could not be granted would be that the claim involves an inter-union representational dispute which district courts have no jurisdiction to resolve.

If the Middle District correctly denied the motion to intervene in the Engineer's suit, the Southern District's dismissal of the complaint was proper both on the ground of lack of jurisdiction, which was the Middle District's ground for denial of intervention, and on the ground of res judicata. The motion to dismiss and the motion to intervene were virtually identical, raising the same issues regarding a justiciable interest of the Firemen in the Engineers-Seaboard agreement. The principles of res judicata are applicable to fully litigated issues raised by a motion to intervene. Cheyenne River Sioux Tribe of Indians v. United States, 8 Cir. 1964, 338 F.2d 906, 911, cert. denied, 1965, 382 U.S. 815, and res judicata applies to the issue of jurisdiction, Hicks v. Holland, 6 Cir. 1956, 235 F.2d 183, cert. denied, 1956, 352 U.S. 855; cf. Brotherhood of Locomotive Firemen & Enginemen v. Louisville & Nashville R.R., 6 Cir. 1968, 400 F.2d 572, 69 LRRM 2103 [Nos. 17,588 & 18,479, Aug. 28, 1968], cert. denied, 1969, 70 LRRM 2249, 37 U.S.L.W. 3262.

By challenging the validity of the Engineers-Seaboard agreement in their attempt to intervene in the Engineers' Middle District suit to enforce it, the Firemen seek to bring themselves within the narrow scope of judicial intervention in railway labor disputes. Judicial consideration of railway labor disputes is rare, particularly in representation disputes where the National Mediation Board has exclusive jurisdiction: Switchmen's Union of North America v. National Mediation Bd., 1943, 320 U.S. 297, 64 S.Ct. 95, 88

L.Ed. 61, 13 LRRM 616; General Committee of Adjustment v. Missouri-Kansas-Texas R.R., 1943, 320 U.S. 323, 64 S.Ct. 146, 88 L. Ed. 76, 13 LRRM 627; General Committee of Adjustment v. Southern Pacific Co., 1943, 320 U.S. 338, 64 S.Ct. 142, 88 L.Ed. 85, 13 LRRM 635. Although courts have jurisdiction to settle a dispute which poses a genuine issue as to the validity of a collective bargaining agreement, and not its interpretation, Order of Ry. Conductors & Brakemen v. Switchmen's Union of North America, 5 Cir. 1959, 269 F.2d 726, 729, 44 LRRM 2432, and cases collected id. at n. 5, "district courts have no such authority where 'validity' of the contract depends upon the merits of a representational dispute." Division No. 14, Order of R.R. Telegraphers v. Leighty, 4 Cir. 1962, 298 F.2d 17, 19, 49 LRRM 2421, cert. denied, 1962, 369 U.S. 885, 50 LRRM 2232.

The Firemen contend that the Engineers-Seaboard agreement is invalid because it changes the subject matter of pre-merger tripartite agreements from which no party could withdraw without the consent of the Firemen or from which withdrawal could be accomplished only upon thirty days' notice and further proceedings under the Railway Labor Act. The Firemen argue that the subject matters of the pre-merger tripartite agreements were such that changes in their provisions inexorably affect both the Firemen and the Engineers. They assert that because their rights were fixed by the pre-merger agreements and both Seaboard and the Engineers were required to maintain pre-merger agreements in effect until changed following the merger, the rights of the Firemen under those agreements could not be altered through bilateral negotiations and agreements between the Engineers and Seaboard. Thus the Firemen claim the right to negotiate along with the Engineers and Seaboard regarding those matters covered by the pre-merger tripartite agreements, and that the bilateral agreement between the Engineers and Seaboard is invalid because the Firemen were neither a party to its negotiation nor have consented to it. We disagree.

While it well may be that the firemen are entitled to negotiate regarding subjects of the Engineers-Seaboard agreement, the issue is not one for judicial consideration. The

determination as to which labor organization may treat with a railroad regarding a particular issue because of "an asserted overlapping of the interests of two crafts," General Committee of Adjustment v. Missouri-Kansas-Texas R.R., *supra* at 334, is a representational dispute within the exclusive jurisdiction of the National Mediation Board, whether the dispute is between two unions, *id.*, or within one union, Division 14, Order of R.R. Telegraphers v. Leighty, *supra*, or following a merger, *id.*; Brotherhood of Ry. & Steamship Clerks v. United Air Lines, Inc., 6 Cir. 1963, 325 F.2d 576, 54 LRRM 2774.

Although a district court at times may have jurisdiction to enjoin unilateral changes in the status quo established by collective bargaining agreements, Texas & New Orleans R.R. v. Brotherhood of Ry. & Steamship Clerks, 1930, 281 U.S. 548, a merger by its very nature requires changes in the status quo. Were it otherwise, the employee protective agreements negotiated by both the Firemen and the Engineers would have been unnecessary. Here the merger required a consolidation of the rights of the Firemen and the Engineers on the constituent railroads, with a merger of conflicting rights of each union as against the merged railroad and vis-a-vis the other union. The Engineers have consolidated their prior agreements through a new agreement which on its face applies only to engineer employees, although it indirectly affects fireman employees. The negotiations through which the agreement was reached were held bilaterally, as the separate employee protective agreements by providing for negotiations "in each craft" obviously contemplated and the principle of exclusive representation would seem to require. See Virginian Ry. v. System Federation No. 40, 1937, 300 U.S. 515, 548, 1 LRRM 743; Brotherhood of Locomotive Engineers v. Chicago & North Western Ry., 8 Cir. 1963, 314 F.2d 424, 431, 52 LRRM 2595.

This Court cannot say that simply because portions of the subject matter of the Engineers-Seaboard agreement formerly were the subject matter of tripartite agreements they necessarily must remain the subject of tripartite negotiations following the merger. We can perceive no distinction between the jurisdiction of a district court to resolve

a dispute over whether a particular subject matter is within the representational jurisdiction of one labor organization rather than another, and the jurisdiction of a district court to resolve a dispute over whether a particular subject matter is within the concurrent representational jurisdiction of two labor organizations. A district court has jurisdiction to resolve neither dispute, the exclusive forum being the National Mediation Board. Underlying the issue of whether the provisions of the Engineers-Seaboard agreement should be in a two-party or a three-party agreement, having been in bipartite agreements on one constituent railroad and tripartite agreements on the other prior to the merger, is the necessity of determining whether the provisions are within the jurisdiction of one union or the other or both, for the provisions are not beyond dispute within the jurisdiction of one bargaining representative or the other. Only the National Mediation Board has jurisdiction to resolve this underlying issue. Thus the asserted "invalidity" of the Engineers-Seaboard agreement depends upon the determination of a jurisdictional dispute between two railway labor organizations, a matter which a district court has no jurisdiction to decide.

The Firemen's motion to intervene in the Middle District litigation constituted an attempt to litigate a jurisdictional dispute between two unions in a federal court and was properly denied for lack of jurisdiction. Stein v. Wirtz, 10 Cir. 1966, 366 F.2d 188, 63 LRRM 2145; Bantel v. McGrath, 10 Cir. 1954, 215 F.2d 297; Rose v. Brotherhood of Ry. & Steamship Clerks, 4 Cir. 1950, 181 F.2d 944; Hobson v. Hansen, D.D.C. 1968, 44 F.R.D. 18. The Firemen's Southern District complaint therefore was properly dismissed for lack of jurisdiction and as res judicata.

AFFIRMED.

THORNBERRY, Circuit Judge, dissenting:—The Firemen (Brotherhood of Locomotive Firemen and Enginemen) maintain that the implementation of the new contract between the Engineers (Brotherhood of Locomotive Engineers) and the railroad abrogates certain tripartite agreements and a formal Mediation Agreement entered into by both unions and the carrier. They argue that the federal courts have jurisdiction to decide the controversy because the railroad and the Engineers have thereby violated an express mandate of the Railway Labor Act. This is that agreements must be carried forward until changed in accordance with Section 2, Seventh and Section 6 of the Act, 45 U.S.C. § 152, Seventh and § 156. In the courts below, appellees successfully contended that the federal courts were without jurisdiction and that the new agreement consummated between them simply "affects" the Firemen and those they represent. The majority of this Court has concluded that the Firemen's claim falls within the exclusive jurisdiction of the National Mediation Board and that the courts below were therefore without jurisdiction. Believing that the Firemen's claim falls within the jurisdiction of the federal courts, I respectfully dissent.

In concluding that the courts are without jurisdiction, the majority has characterized the controversy as a "jurisdictional dispute," which the Supreme Court has held to be within the exclusive jurisdiction of the National Mediation Board, General Committee of Adjustment v. Missouri-Kansas-Texas R. Co. 1943, 320 U.S. 323, 64 S.Ct. 146, 88 L.Ed. 76, 13 LRRM 627; General Committee of Adjustment v. Southern Pacific Co. 1943, 320 U.S. 338, 64 S.Ct. 142, 88 L.Ed. 85, 13 LRRM 635; accord, Switchmen's Union of North America v. National Mediation Board, 1943, 320 U.S. 297, 64 S.Ct. 95, 88 L.Ed. 61, 13 LRRM 616. The General Committee cases likewise involved disputes between the Engineers and the Firemen, each claiming authority to treat with the railroad on a particular issue. When the Firemen and the railroad entered into agreement on the disputed issue, the Engineers brought suit in the district court to set aside the contract on the ground that the railroad had violated the Railway Labor Act by bargaining

with the wrong employee representative. See Section 2, Ninth, 45 U.S.C. § 152, Ninth. The Court held that the federal courts were without jurisdiction to resolve the controversy, reasoning:

> It is clear from the legislative history of § 2, Ninth, that it was designed not only to help free the unions from the influence, coercion and control of the carriers but also to resolve a wide range of jurisdictional disputes between unions or groups of employees. However wide may be the range of jurisdictional disputes embraced with § 2, Ninth, Congress did not select the Courts to resolve them. To the contrary, it fashioned an administrative remedy and left that group of disputes to the National Mediation Board.

The Court further stated:

> In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforceable in the courts should be implied.

General Committee of Adjustment v. Missouri-Kansas-Texas R. Co., *supra*, 320 U.S. at 336-37, 64 S.Ct. at 152-53, 13 LRRM 627.

The typical jurisdictional or representation dispute is over control of membership and work and is characterized by an attempted invasion by one union into the province of another. "It raises the question whether one collective bargaining agent or the other is the proper representative for the presentation of claims to the employer. It involves a determination of the point where the exclusive jurisdiction of one craft ends and where the authority of another craft begins." General Committee of Adjustment v. Southern Pacific Co., supra 320 U.S. at 343, 64 S.Ct. at 145; 13 LRRM 635. Or, it may involve "an asserted overlapping of the interests of two crafts" necessitating "a determination of the point where the authority of one craft ends and the other begins or of the zones where they have joint authority." General Committee of Adjustment v. Missouri-Kansas-Texas R. Co., *supra* 320 U.S. at 334-35, 64 S.Ct. at 151, 13 LRRM 627. There is no question, and the Firemen concede as much, that in the absence of the formal Mediation Agreement and tripartite agreements, the Firemen's claims of the right to be heard in bargaining, of the right to be a party

to any agreement reached in certain areas between the Engineers and the carrier, and of the invalidity of any contract reached without them would present a jurisdictional dispute. It would involve "an asserted overlapping of the interests of the two crafts" and would require an administrative determination whether the Firemen, the Engineers, or both, have authority to deal with the carrier on the disputed issues.

But the present controversy involves more. Unlike the General Committee cases,[1] the dispute centers around the Firemen's claim that the appellees have abrogated existing labor contracts they have entered with the Firemen. These agreements include a series of tripartite agreements and a formal Mediation Agreement regulating matters within the jurisdiction of both unions on the former ACL. The formal Mediation Agreement, A-1607, was the result of a "major dispute" between the parties wherein the National Mediation Board rendered its statutory services resulting in compromise between the carrier and the two unions. This became part of the Schedule Agreements the Engineers and the Firemen each had with the carrier and expressly provided:

> This agreement shall become effective as of January 1, 1945 and remain in effect until changed in accordance with the Railway Labor Act, amended.

and further that:

> None of the parties hereto may withdraw except with the consent of each of the other parties.

Other tripartite agreements between the ACL, the Firemen and the Engineers provided that they:

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[1] Those cases did not involve the abrogation of existing agreements between the parties. Significantly, the Court stated:

> For many years the two Brotherhoods had an agreement which established rules and regulations on these subjects and which provided machinery for resolving disputes which might arise between them. *This agreement was cancelled in 1927. The present dispute arose since that time* . . . . General Committee of Adjustment v. Missouri-Kansas-Texas R. Co., supra 320 U.S. at 325-26, 64 S.Ct. at 147, 13 LRRM 627. (Emphasis added)

> . . . shall remain in effect subject to the serving of thirty (30) days written notice by any party upon each of the other two parties, further handling to be in conformity with the Railway Labor Act, as amended.

These agreements, entered by the three parties under the auspices of the National Mediation Board, established the zones where the two unions have concurrent authority. The subjects of those agreements fall within the province of both unions. As to these subjects, the Board sponsored, and parties accepted, tripartite agreement.[2] The claims of the Firemen predicated upon these agreements do not require the adjudication of a jurisdictional dispute between the two unions because "the zones where they have joint authority," General Committee of Adjustment v. Missouri-Kansas-Texas R. Co., *supra* 320 U.S. at 335, 64 S.Ct., 13 LRRM 627 at 151, have been authoritatively determined. No further administrative adjudication is required.

Rather, the Firemen's claims fall within the well-established jurisdiction of the federal courts to compel compliance with the procedures set forth by the Railway Labor Act for changing agreements affecting rates of pay, rules, or working conditions. See, e.g., Florida East Coast Ry. Co. v. Brotherhood of Railroad Trainmen, 5th Cir. 1964, 336 F.2d 172, 179, 56 LRRM 3009; Manning v. American Airlines, Inc., 2d Cir. 1964, 329 F.2d 32, 33, 55 LRRM 2423; Railroad Yardmasters of America v. Pennsylvania Ry. Co., 3d Cir. 1955, 224 F.2d 226, 36 LRRM 2369. Section 2, Seventh provides that "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in Section 156 [Section 6] of this title." 45 U.S.C. § 152, Seventh Section 6 requires thirty days' written notice of "an intended change in agreements" and proscribes changes in agree-

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[2] In view of the rights conferred upon the Firemen as a party to these agreements, the alternative theory advanced by appellees that the Firemen are without standing to contest the Engineer-carrier agreement is without merit. The new Engineer-carrier agreement allegedly abrogates the Firemen's rights under the tripartite agreements in violation of the Railway Labor Act, and therefore the new contract cannot be said to "merely affect" the Firemen by virtue of the overlapping interests of the two crafts.

ments pending the completion of the procedures of the Act.[3] See generally Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 70 LRRM 2961, 37 U.S.L.W. 4247, 4249 (U.S. March 25, 1969). Judicial intervention to enforce these explicit statutory commands is not incompatible with the Acts emphasis on conciliation, mediation, and arbitration, since its function is to compel the exercise of these voluntary processes. Consequently, the propriety of a judicial decree to insure that contracts under the Act remain in effect until the procedure for change has been exhausted is well established. Southern Ry. Co. v. Brotherhood of Locomotive Firemen and Enginemen, D.C. Cir. 1964, 337 F.2d 127, 132, 56 LRRM 2742; Manning v. American Airlines, Inc., *supra*.

This Court's decision to that effect in Order of Ry. Conductors and Brakemen v. Switchmen's Union of North America, 5th Cir. 1959, 269 F.2d 726, 44 LRRM 2432, is squarely in point. In that case, the Switchmen's Union had been duly certified as bargaining representative for the craft of yardmen on the carrier, thereby replacing the Trainmen in that capacity. The Switchmen gave the railroad a Section 6 notice to change the old Trainmen agreement and a new contract between the Switchmen and the carrier resulted. No Section 6 notice was given the Trainmen. The Trainmen (BRT) and Conductors (ORC&B) then brought suit and challenged the validity of the agreement

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[3] Section 6, 45 U.S.C. § 156 provides:

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by Section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

formulated by the Switchmen and the railroad on the ground that the carrier had not served a Section 6 notice. This Court, as to jurisdiction of the lower court to consider such a controversy, wrote:

> In a consolidated proceeding the District Court held the SUNA contract valid. BRT and ORCB appeal, contending that the agreement is invalid and its enforcement should have been enjoined. Admittedly no Section 6 notice was given by the Railroad to BRT and ORCB, and, if required, the contract is invalid, leaving the prior agreements (or practices) in effect. All are in agreement, with which we concur, that the case poses a genuine issue as to validity, not interpretation, so that on these and other authorities, it is one for judicial consideration.

Id., 269 F.2d at 728-29; accord, McElroy v. Terminal Railroad Assn., 7th Cir. 1968, 392 F.2d 966, 970, 67 LRRM 2681. The same basis for jurisdiction is present here. The Firemen contend that the contested agreement alters the substance of agreements to which they are a party, that they were entitled to Section 6 notice of the contemplated changes, and that the new agreement is therefore invalid for want of notice and conference. It cannot matter that the Firemen's claim may fail on its merits; jurisdiction exists to decide the case either way.

Nor are the district courts without jurisdiction, as the majority suggests, because "validity of the contract depends upon the merits of a representation dispute." Division No. 14, Order of Railroad Telegraphers v. Leighty, 4th Cir. 1962, 298 F.2d 17, 20, 49 LRRM 2421; Brotherhood of Ry. and Steamship Clerks v. United Air Lines, Inc., 6th Cir. 1963, 325 F.2d 576, 54 LRRM 2774. The validity of the contract depends instead upon the requirement of a Section 6 notice of change. "[I]f required, the contract is invalid." Order of Ry. Conductors and Brakemen v. Switchmen's Union of North America, *supra* 269 F.2d at 728. Resolution of that issue may involve a determination of the scope and viability of the agreements the Firemen contend were unlawfully altered without notice and conference. But the adjudication of a representation dispute, as heretofore established, is not involved inasmuch as the zones where the two unions have joint authority have been defined in

the agreements entered under the auspices of the Mediation Board. The district courts, in order to decide if the Firemen were entitled to notice, need only look to the tripartite agreements which the Firemen seek to preserve. In short, this case presents the same justiciable issues involved in any suit brought to compel compliance with the procedures set forth by the Act for the orderly change of agreements. It can make no difference that tripartite agreements between two unions and a carrier, rather than the typical bilateral agreements between a single union and a carrier, are involved. These plainly constitute "agreements" within the meaning of Section 2, Seventh and Section 6. Therefore, it seems clear that if prior to the merger, the carrier (ACL) and the Engineers had changed the substance of the tripartite agreements, the Firemen could have challenged the validity of any new agreement in federal court.

The question remains whether the merger of the two carriers requires a different holding. Appellees contend, and the majority seems to agree, that the separate pre-merger employee protection agreements providing for negotiations "in each craft" have superseded the tripartite agreements. The Firemen, it is argued, have contractually committed themselves to deal solely with the merged carrier in two-party negotiations, thereby wiping out their former right to tripartite negotiation and agreement. The Engineers and the carrier are likewise committed to two-party negotiations and agreement without the Firemen. It inevitably follows, therefore, that in claiming the right to confer with both the carrier and the other union, the Firemen have raised a jurisdictional dispute within the exclusive jurisdiction of the Mediation Board. Under this theory, the situation is the same that would have existed had there never been tripartite agreements. On the other hand, the pre-merger protection agreements, which allegedly supersede the former agreements, also provide that "the Merged Company will take over and assume all contracts, schedules and agreements between Seaboard, Coast Line, and the labor organizations . . . and will be found by the terms and provisions thereof. . . ." This provision would appear to carry the old agreements forward until changed in the

manner prescribed by the agreements or by the Act. Thus, while it is possible, as the majority suggests, that the protective agreements contemplated only two-party negotiations—"in each craft"—and that the Firemen waived their rights to tripartite agreement, it is also possible that the old contracts are still viable. Either way, it is quite plain that *this is a triable issue.* The Firemen should not be shut out of court on the untried, unproven assumption (on the merits) that the formal Mediation Agreement and tripartite agreements died with the merger. On its face, the claim presented by the Firemen predicated on these agreements is justiciable. Their contentions at least warrant a finding by a lower court whether the Mediation Agreement and tripartite agreements are viable documents.

The appellees argue further that by virtue of the merger, the procedures of the Railway Labor Act are inapplicable. The argument is that Section 5 (11) of the Interstate Commerce Act, 49 U.S.C. § 5 (11), relieves the merged company from the restraints and limitations of the Railway Labor Act which would prevent effective consummation of the merger.[4] See Brotherhood of Locomotive Engineers v. Chicago & N.W. Ry. Co., 8th Cir. 1963, 314 F.2d 424, 52 LRRM 2595. Accordingly, the Firemen's claims predicated upon the Railway Labor Act afford no ground for relief. The Firemen, on the other hand, emphasize that Section 5 (11) of the Interstate Commerce Act limits the relief merged carriers have from other federal statutes to the extent "necessary to enable them to carry into effect the transactions so approved." Relief from the procedures set forth in the Railway Act for changing existing agreements, the Firemen argue, is not "necessary" to the affec-

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[4] Section 5(11), 49 U.S.C. § 5(11) provides in pertinent part:

The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power to carry such transaction into effect . . . and *shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law*, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved. . . . (Emphasis added)

tuation of the merger, and therefore Section 6 controls. See Texas & N. O. Ry. Co. v. Brotherhood of Railroad Trainmen, 5th Cir. 1962, 307 F.2d 151, 50 LRRM 2970. But this issue, like that posed by the protection agreements entered prior to the merger, should be developed in one of the courts below in a trial upon the merits. See id. at 158.

In summary, I would hold that this controversy falls within the well-established jurisdiction of the federal courts to insure compliance with the procedure prescribed by the Railway Labor Act for changing agreements. The courts are not required here to determine which of the two unions, if not both, the carrier is to treat with on the issues in dispute. The Mediation Agreement and the tripartite agreements entered under the auspices of the Mediation Board have resolved that question. A jurisdictional dispute, requiring adjudication of the bargaining authority of the two unions, is therefore not involved. Although the merger of the two carriers, as the majority seems to suggest may vitiate the Firemen's claims, either because the tripartite agreements died with the merger or because the Interstate Commerce Act relieves the carrier of obligations imposed by the Railway Labor Act, this is an issue that should be developed in a trial on the merits.